Supreme Court, U.S.
FILED

081100 MAR 3 2009

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No. ____

IN THE
Supreme Court of the United States

ANTOINETTE PIRANT,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

C. STEVEN TOMASHEFSKY
STEIN, RAY & HARRIS LLP
222 WEST ADAMS STREET
SUITE 1800
CHICAGO, ILLINOIS 60606
Telephone (312) 516-2087

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, D.C. 20001
Telephone (202) 639-6048

ERIC A. SACKS
EDWARD P. MCKENNA
JENNER & BLOCK LLP
330 NORTH WABASH AVE.
CHICAGO, ILLINOIS 60611
Telephone (312) 222-9350

Attorneys for Antoinette Pirant

QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in holding, contrary to the Third and Ninth Circuits and the interpretation of the Secretary of Labor presented to the court below, that to meet the 1,250-hours worked threshold for entitlement to benefits under the Family and Medical Leave Act, the time an employee spends donning and doffing required work gear may only be counted if the gear is unique or burdensome to wear.

2. Solely for purposes of determining whether an employee has accumulated enough hours to meet the FMLA eligibility threshold, where an employee alleges she had been wrongfully suspended by her supervisor, can the suspension's time period be counted if the wrongfulness is established in the employee's lawsuit alleging an FMLA violation, or can it be counted only if the employee first prevails in a union grievance proceeding seeking back pay for the wrongful suspension? Here, the Seventh Circuit held that the period of a wrongful suspension can be counted, but only if the employee first prevailed in a union grievance proceeding seeking back pay.

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PARTIES TO THE PROCEEDING

The Petitioner is Antoinette Pirant, the plaintiff and plaintiff-appellant in the courts below. The Respondent is the United States Postal Service ("USPS"), the defendant and defendant-appellee in the courts below.

STATEMENT OF JURISDICTION

The Seventh Circuit's original opinion was entered on September 4, 2008. The USPS filed a timely petition for panel rehearing on November 3, 2008. The court denied that petition, but issued a revised opinion, on December 3, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 1331; 29 U.S.C. § 794(a)(1); 29 U.S.C. § 701 *et seq.*; 29 U.S.C. § 2617(a)(2); and 42 U.S.C. § 12117.

STATUTORY PROVISIONS INVOLVED

The Family Medical Leave Act ("FMLA"), 29

U.S.C.A. § 2612 (a)(1), states in relevant part that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period...because of a serious health condition that makes the employee unable to perform the functions of the [employee's] position." 29 U.S.C. § 2612(a)(1).

An "Eligible employee" is "an employee who has been employed ... for at least 12 months by the employer" and who has "at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). "For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of [the Fair Labor Standards Act] shall apply." *Id.* at 2611(C).

The Portal-to-Portal Act, which applies to the Fair Labor Standards Act ("FLSA"), states in relevant part that "activities not compensable are ...activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C.A. § 254.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Antoinette Pirant was employed by the USPS as a mail handler, working the night shift

at the USPS' Busse facility. She was terminated by the USPS in January 2002. During her employment with the USPS, Ms. Pirant suffered, and still suffers, from degenerative osteoarthritis in her left knee. The USPS was aware of her knee condition.

Before clocking in for her shift, Ms. Pirant typically spent three to five minutes in the locker room changing into a required work shirt and putting on a required apron, protective work gloves, and protective shoes. Ms. Pirant would then take one to two minutes to walk to the time clock from the locker room and clock in for her shift. She would perform the same tasks in reverse at the end of her shift after clocking out. Thus, the time Ms. Pirant spent each day from donning her gear before punching in to doffing it after punching out ranged from eight to fourteen minutes.

In the months leading up to Ms. Pirant's termination, she missed several days of work, primarily due to her osteoarthritis. As a result, the USPS required her to sign a "last chance agreement" in which she acknowledged that she would be terminated if she missed any more work days.

On October 5, 2001, after a dispute on the work floor, Ms. Pirant's supervisor, Frank Peden, ordered her to clock out and go home two hours early. Ms. Pirant filed a grievance requesting back pay and an apology. A USPS dispute resolution specialist investigated the matter, obtaining statements from Mr. Peden and Ms. Pirant about the incident. On December 21, 2001, the dispute

resolution specialist informed Ms. Pirant that she had the right to pursue her grievance. The dispute resolution specialist testified that floor supervisors often improperly ordered employees to go home early. Moreover, Mr. Peden himself conceded that he lacked the authority to order employees to clock out.[1] Another supervisor at the Busse Facility corroborated Mr. Peden's statement that he did not have the authority to suspend Ms. Pirant or order her to clock out early.

Ms. Pirant was terminated before she could pursue that grievance further. On December 5, 2001, she called in shortly before her after-midnight shift was to start, stating that she needed to see a doctor about pain in her knee. She did not report for her shift that night. At her supervisor's request, she brought in documentation showing she had seen a doctor and visited an emergency room, but despite that, on January 11, 2002, the USPS terminated her for the December 6 absence. Ms. Pirant then filed and lost a union grievance asserting wrongful termination.

B. Proceedings Below

Ms. Pirant filed her *pro se* Amended Complaint on February 10, 2004, asserting that her termination had violated her right to leave under the

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[1] Instead, in conflict with Ms. Pirant's testimony, Mr. Peden testified that the incident never occurred, despite the written report recording his statements about the incident. Neither court below addressed that evidentiary dispute.

FMLA. The Amended Complaint asserted that Ms. Pirant had worked 1,250 hours, and the USPS' Answer admitted that allegation. (Pet. App. 3a, 19a.) More than a year later, however, the USPS moved to change its admission to a denial, asserting for the first time that Ms. Pirant had worked only 1,249.8 hours, thus leaving her 12 minutes short of FMLA eligibility. (*Id.* at 19a.) The district court permitted the USPS to amend its answer. (*Id.*) Then, in its reply brief in support of its summary judgment motion, the USPS changed its position again, asserting its records showed Ms. Pirant was 72 minutes short. (*Id.* at 25a.)

In granting summary judgment to the USPS, the district court ignored the USPS' prior admission and its varying hours totals, holding that there was no material fact issue as to whether Ms. Pirant had met the 1250-hour threshold. (*Id.* at 25a-28a.) In addition to challenging the USPS' inconsistent accounting, Ms. Pirant raised two arguments that the district court rejected. First, assuming the clocked-in time was 72 minutes short, the accumulated sum of Ms. Pirant's donning and doffing time would have pushed the total well over 1,250 hours. Second, if the two hours during which Ms. Pirant was wrongly suspended were added, she also would have crossed the 1,250-hour threshold.

On appeal, the Seventh Circuit affirmed. Holding that the time spent putting on and taking off the protective gear should not be counted, the court stated that "donning a minimal amount of nonunique safety clothing, such as helmets, goggles, and steel-

toed boots, is not compensable under the [Fair Labor Standards Act]" ("FLSA"), 29 U.S.C. § 2611(2)(C), which contains the standards for computing FMLA hours. (Pet. App. 62a.) In support of that holding, the court relied on *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008), which held that even where such safety gear was required by the employer, it was not "integral" to the job because it was "non-unique" and "relatively effortless" to don and doff. In a footnote, the Seventh Circuit also cited this Court's decision in *IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005), stating that "post-donning and pre-doffing waiting time" cannot be compensable under the FLSA. (Pet. App. 61a n.2.)

Addressing the wrongful suspension issue, the Seventh Circuit acknowledged that *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004), held that, for eligibility purposes under the FMLA, hours "the employee likely would have worked but for her wrongful termination" should be included. (Pet. App. 10a-11a.) In *Ricco*, the employee grieved her termination and won reinstatement. 377 F.3d at 605. But the Sixth Circuit did not hold that pursuing a grievance was a necessary precondition to having the hours counted. That court only noted in passing that "back-pay awards often include payment for overtime work that an employee would have performed but for her employer's violation of employment laws." *Id.* Consistent with that logic, the Sixth Circuit held that an employee should get FMLA credit for hours worked where the employer wrongfully prevented the employee from working

them. *Id.* But here, the Seventh Circuit held that Ms. Pirant could count the hours only if she had in fact successfully pursued a grievance for back pay, tying federal rights under the FMLA to a union wage grievance having no relation to the FMLA claim: "by failing to pursue a formal challenge to her suspension, Pirant has accepted that she is not entitled to either compensation or FMLA credit for the lost two hours." (Pet. App. 11a.)

After the court of appeals issued its opinion, the Secretary of Labor apparently informed the USPS that, in the Labor Department's view, the Second Circuit's *Gorman* decision wrongly "focused on the nature of the work gear at issue – whether it was unique or non-unique, and how extensive it was." (*Id.* at 39a.) In addition, the Secretary disagreed with the court of appeals' "misreading" of this Court's holding in *Alvarez* and requested that the footnote describing *Alvarez* be deleted.[2] (*Id.* at 48a.) Despite those disagreements, however, the USPS asserted that deleting the case law on which the court of appeals had relied would not change the appeal's outcome. (*Id.* at 54a.)

The court of appeals denied the petition for rehearing, but in fact it granted all the relief the

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[2] The Seventh Circuit's footnote had described this Court's holding in *Alvarez* as excluding all time employees spent walking to and from the changing room where they donned and doffed protective gear (Pet. App. 61a.) In fact, this Court held that time walking from the changing room after the gear had been donned, and to the changing room before the gear was doffed, must be counted. *Alvarez*, 546 U.S. at 34-37.

petition had sought, deleting the references to *Gorman* and the footnote citing *Alvarez*. Because Fed. R. App. P. 40 barred Ms. Pirant from responding unless the court of appeals requested a response – and because Fed. R. App. P. 40 embodies a presumption that the requested relief will not be granted without giving the opponent an opportunity to respond – Ms. Pirant was not afforded an opportunity to explain why, when the proper test was applied, the time she had spent putting on and taking off the required protective gear should be included in the FMLA hours count.

Even without the citation to *Gorman*, the Seventh Circuit's opinion still is based on the protective gear's lack of uniqueness and extensiveness, a test that was expressly rejected by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) and the Third Circuit in *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) *cert. denied*, 128 S. Ct. 2902 (2008).

REASONS FOR GRANTING THE WRIT

This Court should review the decision below for two reasons:

First, the Seventh Circuit's decision, while agreeing with the Second Circuit's decision in *Gorman* and the Tenth Circuit's decision in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), directly conflicts with the Ninth and Third Circuits. In *Alvarez*, the Ninth Circuit held that, for donning and

doffing time to be counted under the FLSA, "ease of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable'" to the job. 339 F.3d at 903. In *De Asencio*, the Third Circuit rejected a test that would focus on "laborious degree of exertion" in donning or doffing the protective gear. 500 F.3d at 373.

This petition presents an excellent opportunity to resolve the conflict between the circuits, which bedevils employers and employees alike. The test used by the Ninth and Third Circuits is more consistent with this Court's *Alvarez* decision, which reiterated that the definition of "work" should look beyond the level of exertion and suggested an approach to preparatory time that focuses on whether the employer requires the time be spent on that activity. 546 U.S. at 40 n.8.

A bright-line test turning on whether the employer requires that the gear be worn will avoid complicated case-by-case adjudication of whether the equipment is burdensome and whether it is "integral" for some reason other than that the employer sees fit to require its use. Indeed, it is appropriate to presume that, if the employer requires that the gear be worn, the gear is integral to the job.

The Seventh Circuit did not solve the conflict by revising the opinion to delete its reference to *Gorman*. The decision still conflicts with the Ninth and Third Circuits because it relies on a finding that the protective equipment is not "extensive and unique," so the time spent donning and doffing that

gear cannot be counted toward the FMLA eligibility threshold. (Pet. App. 13a.) Indeed, the decision still cites a pre-*Alvarez* Tenth Circuit decision that focuses on the degree of physical or mental exertion to determine whether preparatory activities are compensable. (*See id.*, citing *Reich*, 38 F 3d. at 1126 n.1.)

Since the lower courts accepted that Ms. Pirant was required to wear her protective gear, her time should have been counted under the Third and Ninth Circuits' test (as well as the Secretary of Labor's reasoning). It is undisputed that Ms. Pirant would be FMLA eligible with that time counted. The proper resolution of this case is reversal to the lower courts so that Ms. Pirant can proceed with her action based on the USPS' violation of her FMLA rights.

Second, the opinion below creates an unwarranted new doctrine, hitching an employee's entitlement to relief under the FMLA to the successful pursuit of a union grievance for back pay unrelated to the FMLA claim. The FMLA eligibility threshold is set by federal statute and implies no exhaustion requirement. The federal courts are fully capable of determining whether an employee's hours were improperly docked – especially where, as here, the supervisor conceded he lacked authority to order Ms. Pirant to clock out, and the only real dispute was the conflicting testimony over whether the supervisor had in fact ordered her to clock out. The number of hours worked is a fact question to be determined like any other by a judicial fact-finder if contested. Though union contracts may require a

grievance procedure before an employee can be awarded back pay, the USPS cited no contractual provision requiring a grievance procedure merely to establish FMLA eligibility. This Court should hold that no such requirement exists.

I. This Court Should Resolve the Split among the Circuits and Clarify for the Department of Labor whether Consideration of the Degree of Effort Involved in Donning and Doffing Protective Gear is Improper for Computing Hours Worked.

Review by this Court is warranted because the decision below deepens a clear-cut split of authority between the Second, Seventh, and Tenth Circuits on the one side and the Third and Ninth Circuits on the other. In addition, the decision below conflicts with the Secretary of Labor's interpretation of the FLMA, as set forth in Respondent's own petition for rehearing to the Seventh Circuit disavowing the rationale of the decision below as erroneous. And the Seventh Circuit did not eliminate this conflict in authority through the cosmetic changes it made in its opinion in response to the USPS's petition for rehearing, which merely obscured the rationale for the decision by deleting citation to the Second Circuit and deleting a mistaken description of *Alvarez* without in any way altering the rule of decision that conflicts with two other circuits.

a. *The Decision below Widens a Circuit Split on the Standard for Counting Donning and Doffing Time under the FLMA.*

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), this Court left unanswered an important issue that has divided the lower courts for several years: when must time an employee spends donning and doffing protective gear required by the employer be compensable under the Fair Labor Standards Act and countable the Family and Medical Leave Act's 1,250-hour threshold for eligibility?

The FMLA, 29 U.S.C. § 2611(2)(A)(ii), sets a threshold requirement for eligibility: an employee must have worked for an employer at least 1,250 hours during the previous twelve months to be eligible for FMLA benefits from that employer. The FMLA itself contains no standards for computing the hours needed to reach the 1,250 threshold. Rather, it directs courts to apply standards and tests used under the FLSA for what defines compensable "work." *See* 29 U.S. C. § 2611(2)(C). That statute itself is circumscribed by the Portal-to-Portal Act, 29 U.S.C.A. § 254, designed by Congress to exclude from compensation several forms of preparatory activity (like walking) that Congress considered outside the work day. This Court's opinion in *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956), clarified that the Portal-to-Portal Act does not exclude all of these preparatory activities. Employees must still be compensated for activities that are "integral and indispensable to the principal activity," i.e., part of

the employee's job. *Id.*

In *Alvarez*, this Court applied these statutes and *Steiner* to address the FLSA claims of food-processing employees who sought compensation for time during which they donned and doffed their "outer garments, hardhats, hairnets, earplugs, gloves, sleeves aprons, leggings, and boots," as well as "chain link metal aprons, vests, plexiglass armguards, and special gloves." *Alvarez*, 546 U.S. at 30. The lower court in *Alvarez* had held that the donning and doffing time should be counted under the FLSA if the gear was required by the employer, without the need to consider whether the gear was unique to the particular job or burdensome to put on and take off. *Alvarez*, 339 F. 3d at 903.

On certiorari to this Court, the petitioner did not challenge that ruling but sought review only of the lower court's determination that time spent walking to the production floor after the gear had been donned, and to the changing room where the gear was to be doffed, was also compensable. *Alvarez*, 546 U.S. at 32. This Court held that, because the donning and doffing were compensable parts of the work day, time spent after donning and before doffing was necessarily part of a "continuous workday" and thus was also compensable. *Id.* at 37.

Alvarez therefore left open the question whether the donning and doffing themselves were compensable without a showing that the gear was unique and burdensome to wear. This Court did, however, offer suggestions for how that question

should be answered. First, the Court reiterated that "'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA." 546 U.S. at 25. Second, this Court explained that there can be no difference between "integral and indispensable" activities and "principal" activities: "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under...the Portal-to-Portal Act." 546 U.S. at 37. Third, in the Court's discussion of waiting, an activity that by definition requires no exertion, the Court stated that waiting time could be compensable if the employer "required its employees to arrive at a particular time in order to begin waiting." *Id.* at 40 n.8.

As noted above, the Ninth Circuit's opinion in *Alvarez* stressed the key role played by the employer's requirements. In the portion of the opinion not reviewed by this Court, the Ninth Circuit explained that activities are "integral and indispensable" to the principal activity if they are required or "done for the benefit of [the employer]," such as "activities [that] prevent unnecessary workplace injury and contamination." *Alvarez*, 339 F.3d at 903. Indeed, the Ninth Circuit held that the requirements of the employer should be given conclusive weight, while the time and effort should be disregarded:

> This "integral and indispensable" conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g., hardhats) and unique gear (e.g., Kevlar gloves) alike. Little time may be required to don safety glasses and the

> use of safety goggles is undoubtedly pervasive in industrial work. But ease of donning and ubiquity of use do not make the donning of such equipment any less "integral and indispensable" as that term is defined in *Steiner*. Safety goggles are, like metal-mesh leggings, required by IBP, and they are, like metal-mesh leggings, necessary to the performance of the principal work. Both are "integral and indispensable" under *Steiner*'s exception to the Portal-to-Portal Act's bar to compensation of preliminary or postliminary activity.

Id. Thus, the question whether an activity is integral or indispensable cannot hinge on the *kind* of protective gear or the *effort* required to don or doff the gear. Rather, it must focus on whether the activity was required by, or inured to the benefit of, the employer.

Relying heavily on both *Alvarez* opinions, the Third Circuit's decision in *De Asencio*, 500 F.3d at 373, also emphasized the required nature of the preparatory activity, rejecting a test based on the nature of, and the burden associated with, the protective gear. There, the plaintiffs were poultry workers. After a jury decided that the preliminary and postliminary activity they engaged in daily was not "work" under the FLSA, plaintiffs appealed, arguing that the jury instructions had improperly told the jury to "consider whether the activities involved physical or mental exertion." *Id.*

The Third Circuit rejected that instruction, noting that this Court held in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) that exertion is not the hallmark of work under the FLSA. Instead, the Third Circuit placed the proper focus on whether the activity was required by the employer for its benefit:

> [W]e conclude that it was error for the jury instruction to direct the jury to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language in effect impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer; *Armour* demonstrates that exertion is not in fact, required for activity to constitute 'work.'"

Id. The Third Circuit further held that this Court's *Alvarez* decision "precludes the consideration of cumbersomeness or difficulty on the question of whether activities are 'work.'" *Id.* at 370-71.

In sharp contrast to the Third and Ninth Circuits, the court of appeals here did emphasize the type of protective gear and the burden associated with its use, entirely ignoring the USPS' requirement that it be worn. In its original opinion, the court of appeals relied on *Gorman*, 488 F.3d at 593-94, noting that, in *Gorman*, the Second Circuit held that "the donning of a minimal amount of

nonunique safety clothing, such as helmets, goggles, and steel-toed boots, is not compensable under the FLSA." (Pet. App. 62a.) The Seventh Circuit's decision conflicted with the better-reasoned decisions of its sister circuits. Indeed, the original decision was so off the mark that the winning party objected.

b. The Decision below Conflicts with the Department of Labor's Interpretation of the Statute.

After initially prevailing below, even the Government repudiated the court of appeals' reasoning. The USPS, with *amicus* support from the Secretary of Labor, took the extraordinary step of asking the court to rehear the case solely to correct its rationale. As the Secretary's brief argued: "[t]his Court should not have relied on *Gorman* because that decision did not apply the correct criteria to determine whether clothes changing is compensable under the FLSA." (Pet. App. 50a.)

In the Secretary's view, *Gorman* incorrectly emphasized "the 'generic' nature of the clothing worn by plaintiffs in that case, which included helmets, goggles, and steel-toed boots . . . . However, as the Supreme Court recently suggested [in *Alvarez*], this factor is not dispositive in determining whether Plaintiff's donning and doffing is compensable under the FLSA." (*Id.* at 51a-52a.) Indeed, as the Secretary's brief noted, the Labor Department has issued an advisory memorandum stating that "whether clothing is 'unique' or 'nonunique' is not dispositive in determining whether donning and

doffing the clothing is compensable." (*Id.* at 52a, *citing* Wage and Hour Advisory Mem. No. 2006-2 (May 31, 2006), at 3.)

Further, the Secretary explained that, in relying on *Gorman*, the court of appeals had incorrectly emphasized the burden associated with donning and doffing the protective gear. (Pet. App. 52a.) In the Secretary's view,

> The amount of clothing worn, and the amount of effort involved in putting on or taking off this clothing, does not render donning and doffing the clothing non-compensable under *Steiner* and the relevant DOL regulations.

(*Id.* at 52a.) In support of that proposition, the Secretary relied on the Ninth Circuit's opinion in *Alvarez*, which, as already noted, held that "ease of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable' as that term is defined in *Steiner*." (*Id.* at 52a, *citing Alvarez*, 339 F.3d at 903.) The Secretary then referred to several district courts that had rejected *Gorman* on this score, demonstrating the confusion that the case sows. (Pet. App. 52a.)

The Secretary also argued that *Gorman* was incorrectly decided because it ignored a Department of Labor regulation placing the focus on whether the protective gear is required, not on what the gear is. Thus, time spent even in merely changing clothes can be compensable "where the changing of clothes

on the employer's premises is required by law, by rules of the employer, or by the nature of the work." (Pet. App. 51a, *citing* 29 C.F.R. 790.8(c) n.65.)

The rule for which the Secretary argued is the correct rule that should be adopted by this Court.

c. The Conflict in Authority Was Not Eliminated by the Court of Appeals' Cosmetic Changes to Its Opinion in Response to the Government's Rehearing Petition.

In response to the USPS' petition and the Secretary's *amicus* brief, the Seventh Circuit revised the opinion to delete any reference to either *Alvarez* or *Gorman*. (Pet. App. 56a-58a.) On the donning and doffing question, the Seventh Circuit still cites *Reich*, a Tenth Circuit case pre-dating *Alvarez* that is at odds with the Supreme Court's post-*Alvarez* definition of what constitutes compensable "work." The Court in *Reich* focused on the degree of physical or mental exertion, and as with *Gorman*, courts have been prompted to consider whether it is viable precedent in a post-*Alvarez* world. 38 F. 3d. at 1125-26. *See, for e.g., Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1246 (D. Kan. 2007) (stating that "if given the opportunity to revisit the issues in *Reich*, [the Tenth Circuit] would approach its analysis of the pertinent issues differently in light of *Alvarez*.") The Seventh Circuit's revised decision, like the decisions in *Gorman* and *Reich*, is still based on whether the gear is "unique and extensive" or in other words, the *kind* of protective gear and *effort*

involved in wearing it, not on whether the employer required the gear to be worn.

In the *amicus* brief in support of the petition for rehearing, the Secretary suggested that the district court could have been affirmed if the Seventh Circuit did not concentrate on the degree of exertion but instead on whether the protective gear was required. But the Secretary's argument was based on a misapprehension of the record, in the argument that Ms. Pirant did not show she was required to wear her protective clothing.

The Seventh Circuit, like the district court before it, unequivocally held that Ms. Pirant alleged she was required to wear the protective gear. The district court had found that, applying the facts in the light most favorable to the nonmovant for purposes of summary judgment, "Pirant was required to use ordinary gloves and an apron." (Pet. App. 31a.) The Seventh Circuit found, in its final version of its opinion, that Ms. Pirant was "required" to wear a "a uniform, shirt, gloves, and work shoes." (*Id.* at 13a.)

Thus, both courts did hold that Ms. Pirant was *required* to wear at least some items, and like in *Alvarez* and *De Asencio*, the gear was part of "prevent[ing] unnecessary workplace injury" for the employer's benefit. *Alvarez*, 339 F.3d 903; *De Asencio*, 500 F.3d at 372-73. Under the Secretary's own reasoning, there was no basis for the Seventh Circuit to conclude that time spent in putting the gear on and taking it off did not qualify as "integral

and indispensable" to the principal activity. It is not necessary to make an independent judgment as to whether the items were required by the nature of the work. Rather, it is enough, as the Secretary urged, that wearing the items was required by her employer, demonstrating the *employer's belief* that the items were necessary. There is no reason why the courts should second-guess the employer's own judgment.

In any event, the court of appeals did not give Ms. Pirant an opportunity to correct the Secretary's misstatement of the record. Instead, the court of appeals formally denied the petition for rehearing but amended the decision without comment or explanation. (Pet. App. 56a-58a.) The court simply deleted its citations to *Alvarez* and *Gorman* without changing any of the opinion's reasoning. The revised opinion now stands as the reported decision of the Seventh Circuit and contains the same incorrect analysis that the Secretary of Labor identified.[3]

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[3] The Seventh Circuit's opinion also could not have been saved by the notion that the eight to fourteen daily minutes Ms. Pirant spent donning and doffing her gear and walking to the time clock was *de minimis*. Tellingly, the Secretary of Labor did not even make this *de minimis* argument in her *amicus* brief in support of the petition for rehearing. (Pet. App. 49a-50a.) Adding Ms. Pirant's preparatory time would have made her FMLA eligible in mere days. Given that both lower courts rejected the idea that there could be a *de minimis* exception to the 1,250 hours requirement that would have excused Ms. Pirant's minuscule shortfall on the clock (Pet. App. 8a-9a, 31a-32a), it would be perverse to ignore her daily donning and doffing time on the ground that it was *de minimis*.

This Court should grant certiorari to resolve the circuit split and clarify that time spent donning and doffing protective gear is compensable under the FLSA, and includable under the FMLA's eligibility threshold, if wearing the gear is a requirement of the job.

II. This Court Should Resolve the Question whether Hours during which an Employee Is Wrongfully Suspended Can Be Counted toward FMLA Eligibility without the Need for a Prior Grievance Proceeding.

If the time Ms. Pirant spent donning and doffing her protective gear is counted, she would indisputably have exceeded the 1,250-hour eligibility threshold, and there would be no need to reach this second issue. If not, then her two-hour wrongful suspension, if counted, would put her over the top.

As a preliminary matter, the court of appeals agreed with the Sixth Circuit's decision in *Ricco*, 377 F.3d at 604-05, holding that hours during which an employee was wrongfully suspended can be counted toward the FMLA eligibility threshold. (Pet. App. 10a-11a.)

Naturally, the USPS did not concede that Ms. Pirant's suspension was wrongful. But the question whether the suspension was wrongful could and should have been determined by the district court, based on the evidence, including her supervisor's own testimony that he lacked authority to suspend her. Instead, the court of appeals held that Ms.

Pirant was required to use union grievance procedures to make a "formal challenge to her suspension" to prove that she was unlawfully suspended. (*Id.* at 11a.) Because (in light of her termination) Ms. Pirant did not successfully complete the grievance proceeding she initiated about the suspension, and so was not awarded back pay, the court of appeals held it was not open to her to prove that she was unlawfully suspended.

The Seventh Circuit's grievance requirement was its own creation, with no support in prior case law. To be sure, in *Ricco*, the employee had in fact pursued a grievance proceeding. But *Ricco* nowhere held that a grievance proceeding was required. Indeed, in a subsequent decision, *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 557 (6th Cir. 2008), the Sixth Circuit described the rule simply as giving credit for "hours that the employee wanted to work but was unlawfully prevented by the employer from" doing so. The court made no mention that obtaining an arbitral back pay award was a necessary precondition to counting the hours for FMLA purposes.

In this case, the court of appeals elevated the mere fact that an arbitration proceeding had occurred in *Ricco* to decisive significance in determining whether an employee should be credited for FMLA time. That approach is unwarranted. A contractually established grievance proceeding is – in some cases – required as a condition of employment to receive contractually established pay. But the FMLA established a federal right

independent of contract, and nothing in the statute indicates that Congress intended employers to limit FMLA rights by establishing contractual hoops through which an employee must jump.

Put another way, the union contract may require arbitration to determine an award of back pay, but it cannot require arbitration as a precondition to obtaining FMLA relief – nor is there anything in the record suggesting the union contract here even attempted to do so. As this Court held, union arbitrations are appropriate for adjudicating rights arising from a collective-bargaining agreement, but not rights created by federal statute:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 736-37 (1981). Application of this rule for the FLSA has led the Ninth Circuit to conclude that, although exhaustion requirements may be imposed

for contractual rights, "if the claim arises from statutory rights, the plaintiff is not required to exhaust agreement remedies," as the FLSA makes "guarantees to individual workers that may not be waived by collective bargaining." *Collins v. Lobdell*, 188 F.3d 1124, 1127 (9th Cir. 2006) (internal citations and quotes omitted).

In this proceeding, Ms. Pirant was not seeking back pay for the two hours during which she alleges she was wrongfully suspended, so it is not even a matter of an overlap or tension between the contract-based and statute-based rights. Ms. Pirant only sought a ruling that the two hours should have been included in the amount needed to reach the 1,250 hour threshold for FMLA relief. By requiring that she pursue an unconnected back-pay grievance to prove she was eligible under the FMLA, the court of appeals imposed an improper and arbitrary contract-based precondition on Ms. Pirant's eligibility for relief created by a federal statute.

The arbitrariness of the court of appeal's ruling here is evident because, had Ms. Pirant been employed in a non-union shop, there would have been no opportunity for a grievance proceeding, and the issue of her wrongful suspension would necessarily have been determined by the district court. The FMLA directs courts to use standards developed under § 207 of the FLSA to determine the number of hours worked, 29 U.S.C. § 2611(2)(C), it does not direct the courts to defer to union grievance proceedings.

Even without any formal grievance proceeding, the district court or a jury could have determined whether the two-hour suspension was wrongful and the hours should be counted based on the evidence, along with trial testimony from the relevant witnesses. It must be emphasized, however, that the question here is one of law, not of fact. The Seventh Circuit did not review the evidence of wrongful termination and conclude it came up wanting. Rather, it applied the wrong rule of law by requiring that Ms. Pirant "prove" the wrongful termination through a prior grievance proceeding. This Court should grant certiorari to establish the correct rule: the FMLA does not require that disputes over the number of hours worked be determined in employer-mandated grievance proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve important questions under the Family and Medical Leave Act.

Dated: March 3, 2009

Respectfully Submitted,

C. STEVEN TOMASHEFSKY
STEIN, RAY & HARRIS LLP
222 WEST ADAMS STREET
SUITE 1800
CHICAGO, ILLINOIS 60606
Telephone (312) 516-2087

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, D.C. 20001
Telephone (202) 639-6048

ERIC A. SACKS
EDWARD P. MCKENNA
JENNER & BLOCK LLP
330 NORTH WABASH AVE.
CHICAGO, ILLINOIS 60611
Telephone (312) 222-9350

APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit.

Antoinette PIRANT.
Plaintiff-Appellant,
v.
UNITED STATES POSTAL SERVICE,
Defendant-Appellee.
No. 07-1005

Argued October 23, 2007.
Decided September 4, 2008.
As Modified on Denial of Rehearing Dec. 3, 2008

Background: Former employee sued Postal Service under Family and Medical Leave Act (FMLA). The United States District Court for the Northern District of Illinois, Joan Humphrey Lefkow, J., entered summary judgment for Postal Service. Employee appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

(1) Postal Service's inconsistent positions as to whether employee met 1,250-hour requirement for FMLA eligibility did not create fact issue;

(2) employee could not count two hours during which she was suspended toward minimum for FMLA eligibility; and

(3) employee could not count time she spent each workday putting on and removing gloves, shoes, and work shirt toward minimum for FMLA eligibility.

Affirmed.

*203 C. Steven Tomashefsky, Edward P. McKenna (argued), Jenner & Block, Chicago, IL, for Plaintiff-Appellant.
Ernest Y. Ling (argued), Office of the United States Attorney, Chicago, IL, for Defendant-Appellee.

Before BAUER, CUDAHY, and SYKES, Circuit Judges.

SYKES, Circuit Judge.
Antoinette Pirant sued her former employer, the United States Postal Service, for an alleged violation of the Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 ("FMLA"), but her suit failed on the threshold question of her eligibility for FMLA leave. She appeals, contending there were triable issues of fact regarding her FMLA eligibility-specifically, a factual dispute over whether she had worked *204 the statutorily required 1,250 hours during the 12-month period preceding the date of her unscheduled absence from work. *See* 29 U.S.C. § 261 1(2)(A). The district court granted summary judgment for the Postal Service based on Pirant's uncontested payroll records, which showed that she worked 1,248.8 hours during the 12-month period preceding the date of her absence-1.2 hours shy of the minimum required by the FMLA.

Pirant asks us to reverse on a number of grounds. First, she claims that the Postal Service's inconsistent litigation positions regarding her FMLA eligibility entitle her to a trial. She also argues she should receive credit for two hours she lost due to a claimed wrongful suspension. Finally, she contends that the time she spent putting on and removing her gloves, uniform shirt, and work shoes should be counted toward her total hours of service.

We affirm. It is true that the Postal Service initially conceded Pirant's FMLA eligibility in its original answer. But it later obtained leave to file an amended answer denying eligibility and then submitted Pirant's payroll records on summary judgment documenting that her hours of service fell just short of the statutory requirement. This change in the Postal Service's pleading, permitted by the district court in its discretion, is not evidence of a material factual dispute about Pirant's FMLA eligibility; the work hours reflected in Pirant's payroll records were in fact uncontradicted. As to the alleged wrongful two-hour suspension, Pirant did not timely pursue her right to challenge the suspension and have the lost hours restored, so she is not entitled to count these hours for FMLA purposes. Finally, the time Pirant spent donning and doffing her work gloves, uniform shirt, and shoes was "preliminary" and "postliminary" to her principal work activity under the Portal-to-Portal Act, 29 U.S.C. § 254, and therefore is noncompensable under the Fair Labor Standards Act, 29 U.S.C. § 254(a)(2), and is excluded from her FMLA hourly total.

I.

BACKGROUND

Pirant had a tumultuous employment history with the Postal Service. Hired in 1993 as a mail handler, she was terminated at least four times, once each in 1994, 1995, 1999, and in 2000, and also received multiday suspensions in 1997 and 2000, all for failure to maintain a regular attendance record. Each time she was terminated, however, Pirant convinced her superiors to reduce the termination to a suspension.

In March 2001 Pirant again avoided termination by acceding to a written "last chance" agreement. The agreement provided as follows: "It is agreed by all parties to this agreement that any violation of the terms or conditions of this agreement will result in the re-issuance of a Removal. It is further understood that this settlement agreement constitutes an **absolute last chance** to remedy any conduct and attendance problems."

On August 14, 2001, and September 25, 2001, Pirant was again absent without excuse. On September 28 she received a 30-day notice of termination, but on October 26 convinced one of her supervisors to hold it in abeyance until December 10. This was merely a delay of the termination, however, not a rescission of it; the additional grace period did not entitle Pirant to reinstatement, even if she maintained a perfect attendance record in the interim.

In the meantime, on October 5, 2001, Pirant's supervisor ordered her to clock out two hours early, claiming that she was being insubordinate and not doing her ***205** work.[1] Pirant clocked out and went home two hours early, but complained to Darrow Andrews, a Postal Service Dispute Resolution Specialist. Andrews investigated the incident, interviewing both Pirant and her supervisor.

At 10 p.m. on December 5, 2001, Pirant called the Postal Service and left a message with another employee that she could not make it to her next shift. She did not report to work on December 6. On December 7 she returned to work and told her supervisor that she had not been feeling well. The record contains reports reflecting that on December 10, 2001, Pirant visited the emergency room at Provident Hospital of Cook County and was examined for carpal tunnel syndrome and arthritis in the knee. The discharge notes reflect that she was directed not to work from December 10 to December 17, 2001. These reports are stamped "received" on December 14, 2001-presumably by the Postal Service. On December 21, 2001, Andrews informed Pirant of her right to file a formal grievance for restoration of back pay if she still thought she had been wrongfully ordered to clock out two hours early on October 5. She had 15 days to do so, but did not meet this deadline.

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[1] The supervisor denied that he ordered Pirant to clock out, suggesting that she just left early. On summary judgment, however, we accept Pirant's version of the facts.

On January 4, 2002, the Postal Service fired Pirant for violating her March 2001 last-chance agreement. On January 8 Pirant submitted a note from a doctor indicating that she had been absent on December 5 (not December 6), 2001, because of her arthritic knee. In addition, she submitted an absentee form filled out by the employee who had answered her absentee phone call on December 5. The original form had no indication of the reason for Pirant's absence, but Pirant had written in the explanation "arthritis in knee." On January 23 Pirant filed a formal complaint and request for back pay regarding the October 5 clock-out incident; this was more than a month after Andrews told her she could do so and well beyond the 15-day time limit for filing such a request. On April 8 Andrews submitted a report finding that Pirant's request for a formal inquiry into the October 5 incident was too late. Pirant did not pursue an internal appeal or any further challenge to the two-hour suspension, but she did file a formal grievance over her termination. On May 6, 2002, an arbitrator held that the Postal Service had good cause to fire her.

Pirant then took the dispute to federal court. She filed a complaint alleging that the Postal Service violated the FMLA by terminating her for missing work on December 6, 2001, due to her arthritic knee. In its first answer, the Postal Service admitted that Pirant had worked the required 1,250 hours in the 12 months preceding her unscheduled absence in order to qualify for FMLA coverage. Later, however, the district court granted the Postal Service's motion for leave to file an amended answer denying that

allegation.

The Postal Service then moved for summary judgment asserting (among other arguments) that Pirant had not worked the required 1,250 hours in the 12 months prior to her unscheduled absence and was therefore ineligible for FMLA leave. The Postal Service submitted Pirant's biweekly payroll records reflecting her work-hour totals for that 12-month period. The payroll records listed "Paid Hrs" and "TACS Hrs"-the latter is an acronym for the Postal Service's time-clock system. For the 12 months preceding December 6, 2001, Pirant's payroll records credited her with 1,248.8 Paid Hrs and 1,249.8 TACS ***206** Hrs. Both measures fell just short of the 1,250 hours required for FMLA eligibility.

The district court entered summary judgment for the Postal Service, holding that the undisputed payroll records established that Pirant had not worked the required 1,250 hours in the 12 months preceding her unscheduled absence. The court rejected Pirant's argument that the conflict between the Postal Service's first and amended answers-the first admitting her FMLA eligibility and the second denying it-entitled her to a trial. The court also held that the slight difference between Paid Hrs and TACS Hrs on Pirant's payroll records did not demonstrate a material factual dispute requiring a trial. On this point the court noted that TACS Hrs represented the hours clocked on the Postal Service's time-clock system, which were later converted into Paid Hrs according to regular and overtime pay categories. Either way, Pirant had not come forward

with any evidence to contradict the accuracy of her payroll records, which established her ineligibility for FMLA leave. Pirant also argued that the two hours she lost due to the October 5, 2001 suspension ought to be counted because her supervisor wrongly ordered her to "clock out," but the court viewed this as nothing more than a subjective belief on Pirant's part, not enough to create a material issue for trial. The court also held that the time Pirant spent putting on her gloves, uniform shirt, and shoes was not compensable under the Fair Labor Standards Act and therefore was excluded from the calculation of her hours of service under the FMLA. Finally, the court rejected Pirant's argument that her failure to satisfy the 1,250-hour requirement should be excused as *de minimis*.

II.

ANALYSIS

[1] We review a grant of summary judgment de novo, construing the facts and all reasonable inferences in favor of the nonmoving party. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir.2000); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On appeal Pirant renews the arguments she made in the district court, with the exception of her contention that a *de minimis* shortfall in work hours may be disregarded for purposes of FMLA eligibility. She was right to drop this last argument. The FMLA guarantees eligible employees 12 weeks of leave for the birth or adoption of a child; to care for

a child, spouse, or parent with a serious health condition; or "because of a serious health condition that makes the employee unable to perform the functions of the [employee's] position." 29 U.S.C. § 2612(a)(1). "Eligible employee" is defined in the statute as "an employee who has been employed ... for at least 12 months by the employer" and who has "at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). We have previously held that "[t]he statutory text is perfectly clear and covers the issue [of leave eligibility]. The right of family leave is conferred *only* on employees who have worked at least 1,250 hours in the previous 12 months." *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir.2000) (emphasis added). We proceed then to Pirant's remaining arguments.

***207 A. The FMLA's 1,250-hour Requirement**

[2][3] Pirant maintains that the Postal Service's initial admission of her FMLA eligibility, and the removal and replacement of that admission with a denial in the amended answer, is enough to establish a material factual dispute entitling her to a trial. Not so. An amended pleading supersedes the original, *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir.2002), and an inconsistency between the initial and amended pleading does not preclude summary judgment. That an amended pleading differs from the original is hardly surprising; that difference alone does not necessitate a trial.

Here, the Postal Service submitted Pirant's payroll records as objective evidence of Pirant's hours of service, and Pirant presented no evidence to refute the accuracy of her records. As the district court noted, the question of Pirant's eligibility under the FMLA does not turn on any issues of credibility or evidence-weighing; it is established (or not) by the total hours of work reflected in her payroll records.

On that point Pirant argues that the difference between the Paid Hrs and the TACS Hrs in her payroll records raises a triable factual dispute. Again, as the district court explained, TACS Hrs corresponded to the hours clocked on the Postal Service's time-clock system, while Paid Hrs reconciled those hours pursuant to "regular" and "overtime" categories of pay. By either measure, however, Pirant falls short-by an admittedly tiny .2 hours if the TACS Hrs total is used and an only slightly larger 1.2 hours if the Paid Hrs total is used. The discrepancy between these two hourly measures in the Postal Service's payroll records does not entitle Pirant to a trial. The district court properly concluded that the undisputed evidence of Pirant's hours of service for purposes of the FMLA fell just short of establishing the 1,250 threshold required by the statute.

B. The Alleged Wrongful Two-Hour Suspension

[4] Pirant also argues that she should be credited for the two hours she alleges she missed when her supervisor improperly ordered her to clock out early. Citing the Sixth Circuit's decision in *Ricco*

v. Potter, 377 F.3d 599 (6th Cir.2004), Pirant argues that hours not worked because of a wrongful suspension or discharge count as hours of service for FMLA purposes. *Ricco* does not help her here. That case involved a Postal Service employee who was terminated, then grieved the termination and won reinstatement and a make-whole order from an arbitrator. The employee later sought FMLA leave. The Sixth Circuit held that the hours-of-service calculation for purposes of determining the employee's FMLA eligibility should include the "hours the employee likely would have worked but for her unlawful termination." *Id.* at 605.

Here, Pirant was advised of her right to file a formal grievance and request for back pay after the October 5, 2001 clock-out incident. She did not do so-not, at least, until *after* she was terminated and long after the 15-day regulatory filing period had expired. Nor did she pursue any challenge to the dismissal of her belated grievance as untimely. As the district court noted, Pirant is left with only an unsubstantiated subjective belief that her two-hour suspension was wrongful. That is not enough to create a genuine factual dispute for trial. By failing to pursue a ***208** formal challenge to her suspension, Pirant has accepted that she is not entitled to either compensation or FMLA credit for the lost two hours.

C. Donning and Doffing of Gloves and Uniform

[5] Finally, Pirant claims she is entitled to credit for the three to five minutes she spent each workday putting on and removing her gloves, shoes,

and work shirt. The FMLA provides that the determination of whether the hours-of-service requirement for leave eligibility has been met is governed by the legal standards of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(2)(C) (cross-referencing 29 U.S.C. § 207).

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), the Supreme Court held that the time employees spent donning aprons and overalls was compensable under the FLSA. But Congress responded with the Portal-to-Portal Act, 29 U.S.C. 29 § 254, which amended the FLSA to exclude from compensation "activities which are preliminary to or postliminary to [the] principal activity [the employee is employed to perform] ... which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2).

In a subsequent case interpreting the amended statute, the Supreme Court held that activities such as washing up or changing clothes would be compensable only "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded" by the Portal-to-Portal Act. *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956). The Court held in *Steiner* that a battery manufacturer must compensate its employees for the 30 minutes they spent putting on unique protective clothing and

bathing at the factory because those activities were indispensable to the health and safety of the employees. *Id.* The Court noted, however, that "changing clothes and showering under normal conditions" generally would not be compensable. *Id.* at 332; *see also* 29 C.F.R. § 790.7(g) ("[o]ther types of activities which ... would be considered 'preliminary' or 'postliminary' activities, include ... changing clothes, washing up or showering"); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir.1994) (requiring employees to put on safety glasses, earplugs, and a hard hat "is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe"); *Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556 (E.D.Tex.2001) (donning of aprons, smocks, gloves, boots, hairnet, and earplugs not compensable).

Here, Pirant was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes. The donning and doffing of this type of work clothing is not "integral and indispensable" to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead,***209** akin to the showering and changing clothes "under normal conditions" that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity. Accordingly, the district court properly concluded that Pirant is not entitled to include this time in her hours-of-service total for purposes of the FMLA.

AFFIRMED.

Appendix B

United States District Court,
Northern District of Illinois
Eastern Division

Antoinette PIRANT. Plaintiff
v.
UNITED STATES POSTAL SERVICE, Defendant.
No. 03 C 9383

December 7, 2006.

Clark Steven Tomashefsky, Courtney M. Beemer, Edward Paul McKenna, Jenner & Block LLP, Chicago, IL, for Plaintiff.

Ernest Yi Ling, United States Attorney's Office, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

LEFKOW, J.

***1** Plaintiff, Antoinette Pirant ("Pirant"), filed an amended complaint against defendant, the United States Postal Service ("USPS"), alleging that she was terminated in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq*, for missing work due to a chronic medical condition that is covered by the FMLA. The court's jurisdiction is invoked under that statute. Presently before the court is the USPS's motion for summary judgment. For the reasons stated below, the USPS's motion is

granted.

SUMMARY JUDGMENT STANDARDS

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FedR.Civ.P. 56(c). To determine whether any genuine fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c) Advisory Committee's notes. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In response, the nonmoving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir.2000). A material fact must be outcome determinative under the governing law. *Insolia*, 216 F.3d at 598-99. Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir.2000), the court must construe all facts in a light most favorable to the nonmoving party as well as view all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FACTS

From March 1993 to January 2002, Pirant was employed by the USPS as a mail handler, working the night shift first at the USPS's O'Hare facility and then at its Busse facility. USPS's Local Rule 56.1 Statement of Material Facts ¶ 1, hereinafter USPS ¶ __. During that time, Pirant accumulated several unexcused absences. *Id.* ¶¶ 2-12.As a result, Pirant received a number of disciplinary sanctions, including multiple suspensions. *Id.*

On March 29, 2000, Pirant was given a long-term suspension for failing to maintain a regular attendance record. *Id.* ¶ 10.Pirant remained suspended until March 15, 2001 when she returned to work under what the USPS termed a "Last Chance Agreement" ("the agreement").*Id.* ¶ 12.Under the agreement, Pirant was required, among other things, to maintain satisfactory attendance, which meant no more than three unscheduled absences and no instances of AWOL, or absent without official leave. *Id.* ¶ 13.

*2 During that spring and summer, Pirant had several unscheduled absences.*Id.* ¶¶ 14-17.On July 17, September 2 and September 3, Pirant was absent due to an alleged illness. *Id.* On August 14, 2001 and September 25, 2001, Pirant was AWOL. *Id.* For these latter absences, Pirant did not claim then, nor does she now, that they were anything other than unexcused. *Id.*

On September 28, 2001, Pirant was notified of

her removal from employment because of her absences and for other violations of the agreement. *Id.* ¶ 18.On October 26, 2001, however, Gerald Kubick, plant manager of the Chicago Airmail Center and the Chicago Metro Surface Hub, at Pirant's request, placed her removal in abeyance for 45 days. *Id.* ¶ 19.The abeyance agreement, initialed by both Kubick and Pirant, stipulated:

"Hold in abeyance for 45 days 12/10/01. Must not have any further unsched. absences. No conduct issues. No work perf. issues. Agree only to discuss in 45 days."

Id. The abeyance agreement further provided that Pirant could still be removed for the violations of the agreement even if she maintained perfect attendance during the 45 day period her removal was held in abeyance. *Id.* ¶ 20.

On December 5, 2001, at 10:30 p.m., three hours before her next shift was to begin, Pirant called in an unscheduled absence. *Id.* ¶ 21.She returned to work on December 7, 2001, and remained employed until January 4, 2002, when the USPS again issued her a notice of removal, thereby terminating her employment.*Id.* ¶ 25.

An arbitrator denied Pirant's union grievance on May 6, 2002, holding that the USPS had just cause to remove her. *Id.* ¶ 30.On December 29, 2003, Pirant filed a complaint under the FMLA, which was later amended on February 10, 2004. *Id.* ¶ 31.

On May 26, 2004, the USPS answered Pirant's

amended complaint. *Id.* ¶ 37.In its answer, the USPS admitted that Pirant had been employed by the USPS for at least 1,250 hours in the 12 months prior to the commencement of her leave.*Id.* ¶ 38.On June 24, 2005, the USPS was given leave to file an amended answer. *Id.* ¶ 40.In the amended answer, the USPS denied that Pirant had worked at least 1,250 during that period. *Id.*

DISCUSSION

Congress enacted the FMLA in part "to entitle employees to take reasonable leave for medical purposes." 29 U.S.C. § 2601(b)(2). The FMLA provides "eligible employees" of a covered employer the right to take unpaid leave of up to 12 work weeks in any 12 month period for a "serious health condition" as defined by the FMLA. *Id.*; *see* 29 U.S.C. § 2612(a)(1). After the period of qualified leave expires, the employee is entitled to be reinstated to the "position of employment held when the leave commenced" or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." *Id.*; *see* 29 U.S.C. § 2614(a). To insure the availability of these guarantees, the FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided."*Id.*; *see* 29 U.S.C. § 2615(a)(1).

*3 The USPS contends that Pirant was not an "eligible employee" as defined by the FMLA because she did not work the requisite 1,250 hours during the 12 months prior to the commencement of her desired

leave. Under the FMLA, an "eligible employee" is one who has worked for a covered employer for at least 12 months, has worked at least 1,250 hours during the previous 12 months, and has been employed at a worksite where there are at least 50 or more employees within a 75 mile radius. 29 U.S.C. § 2611(2)(A); 29 U.S.C. § 2611(2)(B)(ii). An employee must satisfy each of these criteria independently to be eligible for FMLA leave. 29 C.F.R. § 825.110. Thus, an employee who has less than 1,250 hours of service in the previous 12 month period is not entitled to the protections of the FMLA and may not maintain an action under the Act. 29 C.F.R. § 825.110.[1]

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[1] In its opening memorandum the USPS also argued that it is entitled to summary judgment because Pirant failed to timely file suit under the FMLA. The argument is unavailing. Under the FMLA, 29 U.S.C. § 2617(c)(1)(3), an action for a violation of the statute must be brought within two years of the last event constituting the alleged violation for which the action is brought. The parties agree that the date of the last event in this case was January 4, 2002, the date when Pirant's employment with the USPS was terminated.

Pirant originally filed suit on December 29, 2003, which was within two years of her termination. The court subsequently dismissed Pirant's complaint with leave to amend, which she did on February 10, 2004. Under Fed.R.Civ.P. 15(c), an amendment of a complaint relates back to the date of the original complaint when the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint. Since Pirant's amended complaint raised claims based on the same conduct, transactions, and occurrences alleged in her original complaint, the amended complaint related back to the

To determine whether an employee has worked the minimum 1,250 hours of service, the FMLA directs courts to examine the principles established under the Fair Labor Standards Act ("FLSA") for determining compensable hours of work. 29 U.S.C. § 2611(2)(C); 29 C.F.R. § 825.110(c). Under the FLSA, "hours worked" does not include time paid, but only time spent working. *Kosakow v. New Rochelle Radiology Associates*, 88 F.Supp.2d 199, 205 (S.D.N.Y. 2000). Specifically, any work hours paid when no work was performed due to vacation, holiday, illness, and other similar causes are not considered "hours of employment" under the FLSA. 29 U.S.C. § 207(e)(2).

If an employer does not maintain an accurate record of hours worked by an employee, the employer has the burden of showing that the employee has not worked the requisite hours. 29 C.F.R. § 825.110(c). "An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not 'eligible' for FMLA leave." *Id.* "[A]ny accurate accounting of actual hours worked under FLSA's principals [sic] may be used." *Id.*

It is undisputed that Pirant worked at least 1,248.8 hours in the 12 months prior to the commencement of her leave. Pirant argues, however, that it should be presumed that she worked the

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date of the timely filed original complaint. Accordingly, Pirant's suit was timely filed.

requisite 1,250 hours because 1) the USPS admitted in its original answer to her complaint that she did; 2) the USPS failed to count all of her FMLA hours; and 3) if there is any shortfall, it should be disregarded as *de minimis*.

A. The USPS's Admission In Its Original Answer Is Not Impeaching

Pirant contends that the USPS's admission in its original answer that she had worked more than 1,250 hours in the 12 months preceding the commencement of her leave is sufficient to defeat summary judgment because it would be admissible at trial to impeach the USPS's revised calculation of her FMLA hours. As such, Pirant maintains, the USPS's original answer creates a fact issue as to whether Pirant worked the requisite 1,250 hours.

***4** Pirant relies on *Nisbet v. Van Tuyl*, 224 F.2d 66, 71 (7th Cir. 1955). In *Nisbet*, the Seventh Circuit stated:

"Upon a motion for summary judgment the court, in considering the pleadings upon which the motion is in part based, considers amended pleadings rather than prior pleadings superseded by the amended pleadings. An amended pleading ordinarily supersedes the prior pleading. The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and becomes *functus officio*. Therefore the argument of defendants in this regard is untenable. Upon a trial of the issues raised by the pleadings, including the

amended complaint, a complaint superseded thereby might well be offered in evidence by the defense if it contains material admissions by the plaintiffs named in the amended complaint. Such evidence would be admissible in order to enable the court to determine the facts upon the issues being tried. Conversely, upon the trial, plaintiffs would be permitted to show by evidence the explanation, if any there be, as to why the facts relied on by defendants as admissions were stated in the amended complaint differently than the way in which they were stated in the original complaint."

224 F.2d at 71. Superficially *Nisbet* appears to foreclose Pirant's argument, as it expressly precludes consideration of the prior pleading at the summary judgment stage. In *Nisbet*, however, the defendant was attempting to rely on the prior pleading to show the absence of a material fact. Under those circumstances, the rationale for excluding consideration of the prior pleading is clear: to hold otherwise would defeat the plaintiff's right to amend her pleadings. Here, though, no such interest is at stake, because Pirant relies on the USPS's amended answer to show the presence of a material fact issue. Unlike in *Nisbet*, acknowledging the prior pleading in these circumstances is not tantamount to ignoring the amended pleading, since the version of facts in the prior pleading need not be treated as a conclusive judicial admission, but instead as a mere evidentiary admission, which, as the USPS concedes, is how they would be treated at trial. The court therefore finds that *Nisbet* is inapposite and considers the USPS's original answer in resolving its

motion for summary judgment.

It is of little consequence, though, because the USPS's prior admission that Pirant had worked the requisite 1,250 hours is insufficient to create a genuine issue of material fact. In this case, whether Pirant worked a sufficient number of FMLA hours is not an issue that depends on the credibility of a witness. As Pirant concedes, the USPS has presented an accurate and objective measure of her FMLA hours: her payroll records. The credibility of the records is not at issue. Thus, the issue is simply whether the hours reflected in her payroll records add up to 1,250. If they do, she is eligible. If not, she is not. Accordingly, the USPS's original answer is insufficient to defeat summary judgment.

B. The USPS Counted All of Pirant's FMLA Hours

*5 Pirant argues that the USPS undercounted her FMLA hours for three reasons: 1) for every payroll period but one, the USPS relied on the "Paid Hrs" line of her payroll records, which she contends did not capture all of her FMLA hours; 2) it failed to count two hours she lost when her supervisor wrongfully suspended her, directing her to clock out two hours before the end of her scheduled shift; and 3) it omitted the several off-the-clock minutes she spent each day changing into and out of her work clothes and protective gear.

1. **Failure to Rely on the "TACS Hrs" Line of the Payroll Records**

In its opening memorandum, the USPS maintained that Pirant earned 25 FMLA hours between December 3, 2001 and December 5, 2001, giving her a total of 1249,8 FMLA hours since December 6, 2000. After Pirant attacked both totals, the USPS revised its calculations, maintaining in its reply memorandum that she worked 24 FMLA hours during that three-day stretch in early December 2001 and 1248.8 FMLA hours for the 12 months preceding the commencement of her leave.

Pirant contends that the USPS's calculation in its opening memorandum was based on the "TACS Hrs" line of her payroll records, whereas the substitute calculation in the reply memorandum utilized the "Paid Hrs" line. Pirant argues that the USPS's initial use of her "TACS Hrs," which in this and other instances are higher than "Paid Hrs," creates a genuine issue of material fact as to whether "TACS Hrs" include FMLA hours not captured by "Paid Hrs" and therefore whether they should have been used to calculate her FMLA hours for every other payroll period.

The USPS tracked employee hours at the Busse facility through a time-clock system called the Time/Attendance Control System ("TACS"). Employees "clocked in" at the start of their shift and then "clocked out" at its end. The hours recorded by the TACS were then used by the USPS to determine an employee's compensable hours.

The USPS's payroll records tracked, among other things, employees' daily hours, as well as their hours for the biweekly payroll period. An employee's daily hours were subdivided into "Code 52" and "Code 53" hours, which as will be explained further below, loosely represent "regular pay" and "overtime pay" hours respectively. An employee's hours for the biweekly pay period were subdivided into "Paid Hrs" and "TACS Hrs," while each of those respective categories were then themselves subdivided into "Code 52" and "Code 53" hours. "Paid Hrs" and "TACS Hrs" are each a composite of the daily "Code 52" and "Code 53" hours. The dispute in this case, however, centers on whether "Paid Hrs" and "TACS Hrs" capture different hours, and if so, which line best reflects Pirant's FMLA hours.

The parties' briefs on this issue are not particularly illuminating, but it is nevertheless clear that "TACS Hrs," at least those reflected in Pirant's December 1-14 payroll records, do not include FMLA hours over and above those reflected in "Paid Hrs." USPS exhibit 1, page 002, shows that on Saturday, December 7, 2001, Pirant worked 8.53 total hours, .53 of which were overtime hours. The same page of that exhibit also shows that on Wednesday, December 11, 2001, Pirant worked a total of 8.51 hours, .51 of which were overtime hours. In light of the correlation between the fractions in the "Code 52" and "Code 53" entries on those dates, it is readily apparent that the daily "Code 52" represents a combination of both "regular pay" and "overtime pay" hours. It may in some instances include other types of compensable and non-compensable hours, but in

these examples there is no question that it does not.

*6 Having established that only "regular pay" and "overtime pay" hours are reflected in the daily "Code 52" and "Code 53" entries for December 8, 2001 through December 14, 2001, and thus that all of Pirant's possible FMLA hours for that period are accounted for, it is clear what the respective "Code 52" and "Code 53" entries on the "Paid Hrs" ' and "TACS Hrs" ' lines represent. The 38.98 hours reflected in "Code 52" of the "Paid Hrs" line is the sum total of the daily "Code 52" entries for December 8, 2001 through December 14, 2001, minus the overtime hours. Thus, on the "Paid Hrs" line, the "Code 52" entry represents a "pure" total of "regular pay" hours, whereas the daily "Code 52" entries represent a combination of "regular pay" and "overtime pay" hours. On the "Paid Hrs" line, the 1.04 "overtime pay" hours are exclusively represented by "Code 53." Taken together, "Code 52" and "Code 53" of the "Paid Hrs" line show that Pirant worked 40.02 hours during that period and thus, earned 40.02 FMLA qualifying hours. That sum total is then reflected in "Code 52" of the "TACS Hrs" line, which like the daily "Code 52" entries thus represents a combination of "regular pay" and "overtime pay" hours. "Code 53" of the "TACS Hrs" line, just like "Code 53" of the "Paid Hrs" line, represents a "pure" total of "overtime pay" hours: 1.04. "Paid Hrs" and "TACS Hrs" are thus, at least in this example, merely different statements of the same hours.

The same is true with respect to the "Paid

Hrs" and "TACS Hrs" reflected in the more relevant USPS exhibit 1, page 001. The payroll records shows that on Tuesday, December 4, 2001, Pirant worked one hour of overtime. As a consequence, the "Code 52" entry for that date shows "9.00" hours worked and the "Code 53" entry shows "1.00" hour of overtime. That one hour thus represents the difference between the 29.99 hours of "regular pay" hours reflected in "Code 52" of the "Paid Hrs" line and the 30.99 hours of "regular pay" plus "overtime pay" hours reflected in "Code 52" of the "TACS Hrs" line. In sum, subtracting the "6.99" hours Pirant worked after requesting leave on December 5, 2001, the payroll records undeniably show that Pirant worked 24 hours between December 3 and December 5 and earned the same number of FMLA hours during that period.

In light of the foregoing, even if the USPS relied on the "TACS Hrs" line in its opening memorandum, that fact is insufficient to defeat summary judgment. Pirant cannot claim that she worked hours, FMLA qualifying or otherwise, other than those reflected in the daily "Code 52" and "Code 53" entries. As such, the daily "Code 52" and "Code 53" entries represent Pirant's total possible number of FMLA hours for those dates. Since those entries confirm that Pirant only worked a total of 24 hours between December 3, 2001 and December 5, 2001, the inference urged as a result of the USPS's apparent mistaken reliance on the "TACS Hrs" line is foreclosed.

2. Failure to Count Hours Lost Due to Wrongful Suspension

*7 Pirant contends that the USPS failed to count two hours that she lost on October 5, 2001 when she was wrongfully suspended by her supervisor and directed to clock out early. In support of her position, Pirant cites *Ricco v. Potter*, 377 F.3d 599, 604-05 (6th Cir. 2004). In that case, the Sixth Circuit held that the hours-of-service requirement in the FMLA's definition of "eligible employee" included hours for which an unlawfully terminated employee was compensated pursuant to a make-whole arbitration award. The First Circuit disagrees with that broad interpretation, having previously held that the "eligible employee" definition only includes those hours that an employee actually worked. *See Plumley v. Southern Container, Inc.*, 303 F.3d 364 (1st Cir.2002). This court need not resolve the dispute between the circuits, as there is no evidence in this case that Pirant's suspension was wrongful. Pirant's argument is based entirely on her own belief, which however honestly held is insufficient to warrant crediting her with the two hours she would have likely worked had she not been suspended.

3. Failure to Count Preliminary and Postliminary Activity Hours

Pirant next argues that she should be credited for the several off-the-clock minutes she spent each day before and after work changing into and out of her work clothes, which included a work shirt, apron,

gloves, and shoes.

The FMLA's standards for calculating hours of service are derived from the FLSA, which the Portal-to-Portal Act, 29 U.S.C. § 254, modified to provide that employers need not compensate employees for:

> activities which are preliminary to or postliminary to [an employee's] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254. Ordinarily, changing and showering before and after work need not be compensated under the FLSA, though if it is "an integral and indispensable part of the principal activity of the employment" it must be. *Steiner v. Mitchell*, 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267 (1956). "An activity is integral to a principal activity if the activity is made necessary by the nature of the work performed, it fulfills mutual obligations between the employer and the employees, the activity directly benefits the employer in the operation of the business, and the activity is closely related to other duties performed by the employees." *Hiner v. Penn-Harris-Madison Sch. Corp.*, 256 F.Supp.2d 854, 859 (N.D.Ind.2003) (citations omitted).

Here, the principal activity Pirant was employed to perform was handling mail. There is no evidence that that activity touches upon the type of vital considerations of health, safety, or hygiene that

would take Pirant's clothes changing activities out of the range of ordinary clothes changing and showering that need not be compensated under the FLSA. *Compare e.g.*, *Steiner*, 350 U.S. at 247 (changing clothes and showering held to be an integral and indispensable part of a principal work for battery factory workers who used toxic materials and were compelled by circumstances to change and shower in facilities the employer was required to provide by state law). Indeed, there is no evidence that handling mail involved contact with hazardous substances, nor that it required utilization of any type of unique protective or safety gear. Instead, at most Pirant was required to use ordinary gloves and an apron. Donning and doffing these items would have taken mere seconds and would have required little to no physical or mental exertion. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir.2003) (time spent donning and doffing non-unique protective gear such as hard hats, ear plugs, frocks, safety goggles, and hair net was not compensable). As a consequence, Pirant was not entitled to compensation for these activities, and thus, the USPS was not required to include time spent performing them in calculating her FMLA hours.

C. Pirant's Shortfall Cannot Be Excused As *De Minimis*

***8** Having previously found that Pirant's payroll records for December 3, 2001 through December 5, 2001 show that she earned 24 FMLA hours (and not 25 as originally argued) during that period, Pirant worked a total of 1248.8 FMLA hours

in the 12 months preceding the commencement of her leave on December 6, 2001. Pirant is thus 1.2 hours short of satisfying the 1,250 hours-of-service requirement for eligibility under the FMLA. Pirant argues, though, that this shortfall should be disregarded as *de minimis*.

Pirant's counsel, whose advocacy has been thorough and exemplary, does not cite and the court is unable to find a case specifically addressing whether the 1,250 hours-of-service requirement must be strictly applied in situations as close as this. The court's research reveals, however, that courts have strictly applied all of the FMLA's numerical requirements. *See Warren v. United States Postal Service*, 147 Fed.Appx. 969 (Fed. Cir. 2005) (employee who worked 1,240.9 hours in the 12 months preceding the date of the commencement of her leave was not an "eligible employee" under the FMLA); *Grimsley v. Fiesta Salons, Inc.*, 2003 WL 117985 (E.D.Mich. Jan.7, 2003) (employer who employed 49 employees within a 75-mile radius, one short of the FMLA's definitional requirement, was not a covered employer); *Babcock v. BellSouth Advertising and Publishing Corp.*, 348 F.3d 73, 77 (4th Cir. 2003) (employee who commenced her employment on June 1, 1999 was not eligible for FMLA leave on May 27, 2000, because she had not yet been employed for 12 months); *Corcino v. Banco Popular de Puerto Rico*, 200 F.Supp.2d 507 (D. Vi. 2002) (employee who worked 1,197 hours in the applicable 12 month period not an "eligible employee"); *Aldrich v. Greg*, 200 F.Supp.2d 784 (N.D.Ohio 2002) (employee who worked 1,152 hours

ineligible under the FMLA). Although strict enforcement of the FMLA's definitional requirements results in the arbitrary exclusion of employees who would otherwise be eligible, these cases counsel against tinkering with the explicit parameters set by Congress. The FMLA's threshold numerical requirements represent Congress's careful balance of "the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling reasons," *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999), and this court is in no position to second guess that informed and considered judgment. Accordingly, the court declines to excuse Pirant's 1.2 hour shortfall.

In light of the foregoing, Pirant did not qualify as an "eligible employee" as of the date of the commencement of her leave on December 6, 2001 due to her 1.2 hour shortfall. As a result, the USPS was entitled to terminate her employment due to the unscheduled absence.[2]

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[2] As a final note, the court concurs with the USPS's assessment that, in the end, it is irrelevant whether Pirant was entitled to FMLA leave on December 6, 2001. Pirant was already subject to removal on December 6, 2001 due to her violation of the March 2001 "last chance agreement" entered into as a condition for her reinstatement following a nearly one-year suspension. That agreement required Pirant to maintain satisfactory attendance, which under the terms of the agreement meant no more than three unscheduled absences and no instances of "AWOL." As Pirant points out, the agreement's prohibition on "more than three unscheduled absences" is likely unenforceable, as it appears to abrogate Pirant's entitlement to FMLA leave. But even if that provision is void, the agreement's

ORDER

For the reasons stated above, the USPS's motion for summary judgment is granted (# 55). The USPS's motion to strike Pirant's jury demand (# 76) is therefore denied as moot. The case is terminated.

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prohibition on absences without leave is not inconsistent with the FMLA and thus provides a legitimate basis for terminating Pirant's employment. Pirant concedes that she was AWOL on August 14, 2001 and again on September 25, 2001. Each of these absences, neither of which related to the arthritic condition that Pirant contends entitles her to FMLA leave for her other absences, is an independent violation of the agreement and a valid basis for her termination. Thus, even if Pirant were entitled to FMLA leave for her December 6, 2001 absence, she still would not be entitled to recover in this case because the USPS could have terminated her employment on January 4, 2002 due to either or both of these instances of AWOL. Accordingly, the USPS would still be entitled to summary judgment even if Pirant was entitled to FMLA leave on December 6, 2001.

Appendix C

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1055

ANTOINETTE PIRANT,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 03 C 9383 — Joan H. Lefkow, *Judge.*

DEFENDANT-APPELLEE'S
PETITION FOR PANEL REHEARING

PATRICK J. FITZGERALD
United States Attorney
for the Northern District
of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

THOMAS P. WALSH
Assistant United States
Attorney

Chief, Civil Division
Editor

ERNEST Y. LING
Assistant United States
Attorney
(312) 353-5870

Introduction and Statement of Purpose

Pursuant to Fed. R. App. P. 40, the United States Postal Service respectfully petitions this Court for panel rehearing. We do not ask this Court to alter its judgment and disposition of the case. As this Court correctly determined, the record failed to support plaintiff's claims that she had worked the requisite 1,250 hours of employment in the twelve-month period prior to her allegedly seeking leave under the Family Medical Leave Act, and she thus is not entitled to relief under that statute. Nevertheless, at the urging of the U.S. Department of Labor ("DOL"), the Postal Service respectfully requests that the panel rehear this case for the limited purpose of amending its opinion to delete the discussion of and partial reliance upon *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007), a decision that was not addressed in the parties' briefs or during oral argument. Reliance upon *Gorman* is not necessary to affirm the district court's determination that plaintiff made no showing that the time she spent donning her work shirt, shoes, and gloves was compensable. As this Court held, that decision was plainly correct under

established law. *Pirant v. United States Postal Service*, 542 F.3d 202, 208-09 (7th Cir. 2008). We make this unusual request because, as DOL's amicus brief explains, *Gorman* misapplies DOL's longstanding regulations implementing the relevant statutes. We apologize for failing to provide the Court with briefing on this issue earlier, but in deference to the significant concerns articulated by DOL, we respectfully request that the Court amend its opinion by removing the discussion of *Gorman*. In addition, we respectfully request that the panel amend or delete footnote two, which we believe inaccurately describes the holding of *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). *Pirant*, 542 F.3d at 208, n.2.

Statement

1. The Fair Labor Standards Act determines whether an employee has satisfied the Family Medical Leave Act's 1,250 hours of service requirement. *See* 29 U.S.C. § 2611(2)(C). An employer under the FLSA generally must compensate its employees at either minimum wage or overtime rates for all "hours worked." 29 U.S.C. §§ 206, 207. The Portal-to-Portal Act carves out a limited exception to this general rule, relieving an employer of responsibility for compensating employees for travel and other "preliminary" or "postliminary" activities occurring either before an employee starts her first principal activity of the workday, or after she ends her last principal activity of the workday. 29 U.S.C. § 254(a); *IBP Inc. v. Alvarez*, 546 U.S. 21, 27-28 (2005).

2. It has been long established that activities such as changing clothes prior to beginning a work shift are ordinarily excluded from calculating hours compensable under the FLSA (and therefore hours counted toward the FMLA's 1,250-hour minimum), unless those activities "are an integral and indispensable part of the [employee's] principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 249, 256 (1956) (distinguishing time required to be spent at worksite changing and bathing after exposure to toxic chemicals, which was compensable, from "changing clothes and showering under normal conditions," which was concededly not compensable); *Alvarez*, 546 U.S. at 29 (noting same distinction); 29 C.F.R. § 790.8(c) (clothes changing that is merely a "convenience" to the employee and not directly related to her principal activities is not a principal activity); 29 C.F.R. § 790.7(g) ("changing clothes" when "performed outside the workday" and "under the conditions normally present" is not compensable).[1]

3. It was uncontested in district court that Pirant's time sheets showed that Pirant had not quite worked the requisite 1,250 hours prior to

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[1] By contrast, if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c). The regulations note that such a situation "may exist where the changing of clothes *on the employer's premises is required by law, by rules of the employer, or by the nature of the work*." 29 C.F.R. § 790.8(c) n.65 (emphasis added).

allegedly seeking FMLA leave. R. 57, ¶¶ 40, 42. ("R." references are to numbered items in the Record on Appeal.) The only evidence offered to support plaintiff's contention that she should have been credited for time she spent changing was a declaration stating that when she arrived at work she "would put on a work shirt, change shoes, put on my apron and collect [her] gloves"; that it usually took three to five minutes to do so; and that it took about one minute to then walk to the time clock to punch in. R. 62, Ex. F ¶¶ 19-21. But Pirant's declaration provides nothing to support a conclusion that the time she spent on the premises changing clothes was "integral and indispensable" to her job. The declaration does not establish that she was *required* by her employer, or regulation, or by the nature of the work to change clothes in order to perform her job, that she was required to change at her workplace, or that she could not change her clothes prior to arriving at work. R. 62, Ex. F ¶¶ 19-21; see n. 1, *supra*.

4. The district court granted summary judgment, finding, *inter alia*, that Pirant failed to present any evidence that would take her clothes-changing time "out of the range of ordinary clothes changing . . . that need not be compensated under the FLSA." R. 81 at 12. In affirming that decision, this Court cited and relied in part upon the analysis set forth in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), which focused on the nature of the work gear at issue — whether it was unique or non-unique, and how extensive it was — rather than upon whether changing into the work

gear on the premises was required by the employer and "integral and indispensable" to the employee's principal work activities. *Pirant*, 542 F.3d at 208-09 (citing *Gorman*, 488 F.3d at 593-94).

Argument

The Department of Labor's amicus brief explains the basis for its disagreement with *Gorman*, and the basis for its concern with this Court's reliance upon that decision. This Court need not opine on the disagreement that DOL has with *Gorman* in order to resolve the present case. Here, the plaintiff put forward no evidence whatsoever to suggest that the time she spent changing clothes was anything other than the ordinary clothes-changing that DOL regulations and Supreme Court precedent make clear are not compensable under the FLSA (and accordingly do not count toward the 1,250 threshold for FMLA eligibility). *See Steiner*, 350 U.S. at 249, 256; *Alvarez*, 546 U.S. at 29-30; 29 C.F.R. §§ 790.7(g),790.8(c) & n.65; R. 62, Ex. F at ¶¶ 19-21. There was no evidence that Pirant was required to change clothes at work, nothing showing that she could not have done so prior to coming to work, or any other evidence that might create a genuine dispute as to whether or not the clothes-changing at issue here was "integral and indispensable" to plaintiff's work. Accordingly, the Court should affirm the district court's grant of summary judgment based upon straightforward application of *Steiner*, *Alvarez* and the regulations. It need not reach the question of whether, as the Second Circuit appears to believe, the nature of the

clothing at issue can be dispositive of the inquiry. Accordingly, in deference to DOL's concern that effective enforcement of the FLSA is compromised by the *Gorman* decision, we respectfully request that this Court amend its opinion by striking all references to that decision.[2]

Conclusion

For the foregoing reasons, we respectfully ask that the Court grant rehearing and amend its opinion by removing all references to *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007). The Court's judgment of affirmance should remain unchanged.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney
Northern District of Illinois

THOMAS P. WALSH
Assistant United States
Attorney
Chief, Civil Division

ERNEST Y. LING

[2] In addition, we respectfully suggest that the Court take this opportunity to delete or correct the description of the *Alvarez* decision set forth in footnote 2 of its decision. For the reasons explained in DOL's *amicus* brief (at 5-6), we believe that the footnote as currently written is inaccurate.

Assistant United States
Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5870

Appendix D

No. 07-1055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTOINETTE PIRANT,
Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois,
Joan H. Lefkow, Judge

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Defendant-Appellee's petition for panel rehearing. The petition is limited to the issue whether this court applied the correct legal standard in determining that the time Plaintiff allegedly spent each day putting on and taking off her uniform shirt, gloves, and work shoes does not count as "hours worked"

under the Fair Labor Standards Act of 1938, as amended ("FLSA" or "Act"), 29 U.S.C. 201 et seq., and therefore cannot be used to satisfy the Family and Medical Leave Act's ("FMLA") 1,250 hours of service requirement for eligibility, see 29 U.S.C. 2611(2)(A). While the Secretary does not disagree with this Court's decision to affirm summary judgment for the Postal Service in light of Plaintiff's failure to allege any facts sufficient to defeat summary judgment on this issue, the Secretary believes that the Court should not have relied on the Second Circuit's decision in Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2007), cert. denied, 128 S. Ct. 2902 (2008), in concluding that the time Plaintiff spent donning and doffing is not compensable under the FLSA. See Pirant v. United States Postal Serv., 542 F.3d 202, 208 (7th Cir. 2008). The Second Circuit's decision in Gorman is at odds with Supreme Court and other precedent and with the Department of Labor's ("Department" or "DOL") longstanding interpretation of the FLSA and the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. 251 et seq., and has been criticized by other courts. Thus, the Secretary supports Defendant-Appellee's petition for panel rehearing seeking to amend the decision in this case to eliminate any reliance on Gorman, as well as to characterize correctly the Supreme Court's holding in IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in the issue presented by this petition for panel hearing

because she administers and enforces the FLSA. See 29 U.S.C. 204, 216, 217. Consistent with that responsibility, DOL has issued interpretive regulations addressing the compensability of "hours worked" under the FLSA, see 29 C.F.R. Pt. 785, and the Portal Abt. See 29 C.F.R. Pt. 790. The Department also has issued formal guidance on the compensability of donning and doffing activities under the FLSA after the Supreme Court's decision in IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) (in which the United States participated as amicus curiae). See Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006).[3]

The Secretary currently is prosecuting major legal actions seeking compensation under the FLSA for donning and doffing sanitary and protective gear. See, e.g., Chao v. Pilgrim's Pride, No. 07-01352 (N.D. Tex. filed Aug. 6, 2007), transferred to W.D. Ark., No. 08-01011 (Feb. 15, 2008); Chao v. Tyson Foods, Inc., No. 02-1174 (N.D. Ala. filed May 9, 2002). In addition, the Secretary has participated as amicus curiae in a number of federal appeals addressing the compensability of donning and doffing such gear. See, e.g., DeAsencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008); Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), aff'd in part, rev'd in part, and remanded, 546 U.S. 21 (2005); Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), aff'd 546 U.S. 21 (2005). The Department believes that its expertise on this issue

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[3] Available at: http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemo2006_2.pdf.

would be helpful to this Court in considering whether to grant the petition for panel rehearing and amend its decision.

ARGUMENT

THIS COURT DID NOT NEED TO RELY ON THE SECOND CIRCUIT'S ERRONEOUS DECISION IN GORMAN TO CONCLUDE THAT PLAINTIFF'S DONNING AND DOFFING ACTIVITIES WERE NOT COMPENSABLE UNDER THE FLSA

1. The FLSA provides the legal standards for determining whether an employee has satisfied the FMLA's 1,250 hours of service requirement. See 29 U.S.C. 2611(2)(C). Under the FLSA, an employer generally must compensate its employees at either minimum wage or overtime rates for all "hours worked." See 29 U.S.C. 206, 207. The Portal Act, however, creates a limited exception to this general rule, relieving an employer of responsibility for compensating employees for travel and other "preliminary" or "postliminary" activities that occur either before an employee starts his or her first principal activity of the workday, or after an employee ends his or her last principal activity of the workday. See 29 U.S.C. 254(a). All time in between an employee's first and last principal activity (with the exception of bona fide breaks) is part of the "continuous workday" and must be compensated. See IBP, Inc. v. Alvarez, 546 U.S. 21, 28-29 (2005).

The Supreme Court has held that "activities

performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956). The Court recently clarified that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." Alvarez, 546 U.S. at 37. Such an activity is compensable under the FLSA and begins the "continuous workday." Id.

In Steiner, the Supreme Court held that changing into old clean work clothes and showering on the employer's premises by battery plant workers were integral and indispensable to the employees' principal activities. See 350 U.S. at 249, 254-58. The Court based its holding in part on DOL's regulations interpreting the Portal Act. See id. at 255 n.9 (relying on 29 C.F.R. 790.8). These regulations, which were promulgated shortly after the Portal Act was passed, state that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, "if changing clothes is merely a

convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c). DOL's longstanding position is that "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." Wage and Hour Advisory Memorandum No. 2006-2, at 3.[4]

2. As an initial matter, this Court should take this opportunity to correct its misreading of the Supreme Court's decision in Alvarez. This Court stated that Alvarez held "that post-donning and pre-doffing waiting time was not a principal activity and therefore was excluded from coverage under the Portal-to-Portal Act." Pirant v. United States Postal Serv., 542 F.3d 202, 208 n.2 (7th Cir. 2008). In fact, the Supreme Court held that post-donning and pre-doffing waiting time (as well as post-donning and pre-doffing walking time) was compensable as part of

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[4] DOL's Portal Act regulations were ratified by Congress in 1949 when former Section 16(c) of the FLSA was enacted. See Steiner, 350 U.S. at 254-55 & n.8 (quoting Section 16(c) to the effect that existing Wage-Hour regulations and interpretations were to remain in effect unless inconsistent with the 1949 amendments, 63 Stat. 920 (1949), 29 U.S.C. 208 (note)). In any event, these longstanding regulations, as well as this brief construing these regulations and Wage and Hour Advisory Memorandum No. 2006-2, are entitled to deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

the continuous workday. See Alvarez 546 U.S. at 37, 40. The only time the Supreme Court found non-compensable was pre-donning waiting time. See id. at 40.

3. Moreover, while this Court acknowledged Steiner's "integral and indispensable" test, see Pirant, 542 F.3d at 208, it primarily relied on the Second Circuit's flawed decision in Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2007), cert. denied 128 S. Ct. 2902 (2008), to conclude that Plaintiff's donning and doffing is not compensable. This reliance on Gorman, however, is not necessary to decide this case. Rather, this Court could have affirmed the district court's grant of summary judgment to the Postal Service on the basis that Plaintiff failed to allege that the donning and doffing she performed was required to be done on the Postal Service's premises, if it was in fact required at all. See Wage and Hour Advisory Memorandum No. 2006-2, at 3 (clothes changing is not a principal activity if it can be done at home); 29 C.F.R. 790.8(c) (clothes changing that is merely a "convenience" to the employee and not directly related to her principal activities is not a principal activity).

The affidavit Plaintiff submitted to support her claim that she is entitled to credit toward the FMLA's 1,250 hour eligibility requirement for the time she spent each workday putting on and taking off her uniform shirt, gloves, and shoes states only that she would put these items on at the plant before her shift. See Pl's Ex. F, Decl. of Antoinette Pirant filed in support of Pl's Opp'n to Def's Mot. for Summ.

J., at 4, ¶ 19-21 (District Court Docket No. 62); see also Def's Reply Mem. in Support of Def's Mot. for Summ. J. at 6 (District Court Docket No. 68). Plaintiff relied solely on this affidavit in her opposition brief, pointing to nothing else in the record that establishes that she performed these activities at the plant out of necessity, rather than as simply a convenience to herself. See Pl's Opp'n to Def's Mot. for Summ. J. at 2, 9. It is well settled that conclusory allegations and self-serving affidavits, without support in the record, are not sufficient to defeat a motion for summary judgment. See Hall v. Bodine Elec. Co., 276 F.3d 345, 354 (7th Cir. 2002). Because this Court may affirm the district court's entry of summary judgment on any ground that finds support in the record, see Jordan v. Summers, 205 F.3d 337, 342 (7th Cir. 2000), this Court could affirm the district court's judgment on this basis without relying on the Second Circuit's decision in Gorman.

4. This Court should not have relied on Gorman because that decision did not apply the correct criteria to determine whether clothes changing is compensable under the FLSA. First, the Second Circuit considered only selected regulatory language stating that clothes changing, "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities," 29 C.F.R. 790.7(g), and thus noncompensable under the Portal Act. See Gorman, 488 F.3d at 594. The court inexplicably ignored a footnote appended to that regulation, which states, "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the

specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'" 29 C.F.R. 790.7(g) n.49. The court also did not consider another DOL regulation, relied on by the Supreme Court in Steiner, see supra, explaining that clothes changing is compensable if an employee "cannot perform his principal activities without putting on certain clothes," 29 C.F.R. 790.8(c), and stating that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65.[5]

Second, Gorman emphasized the "generic" nature of the clothing worn by plaintiffs in that case, which included helmets, goggles, and steel-toed boots, to support its conclusion that donning and doffing the clothing was not compensable. See 488 F.3d at 594. However, as the Supreme Court recently suggested, this factor is not dispositive in determining whether Plaintiff's donning and doffing

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[5] As this Court noted, Gorman distinguishes Steiner on the basis that the equipment in Steiner protected employees from battery acid and therefore was "indispensable to making the working environment nonlethal." Pirant, 542 F.3d at 208. DOL disagrees with this aspect of the Gorman decision as well. Clearly, an activity may be integral and indispensable to an employee's principal activity without being necessitated by lethal circumstances. See, e.g., Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 911 (9th Cir. 2004) (donning and doffing cleanroom "bunny suits" integral and indispensable to employees' principal activities); Chao v. Tyson Foods, Inc., 568 F. Supp. 2d 1300, 1312 (N.D. Ala. 2008) (agreeing with Secretary's argument that Steiner cannot be read so narrowly).

is compensable under the FLSA. See Alvarez, 546 U.S. at 32 (noting that although the Ninth Circuit had endorsed a distinction between donning and doffing elaborate protective gear and donning and doffing nonunique gear such as hardhats and safety goggles, it did so "not because donning and doffing nonunique gear are categorically excluded from being 'principal activities' as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique protective gear was 'de minimis as a matter of law'"). Indeed, Steiner itself addressed donning and doffing "non-unique" gear – namely, old, clean work clothes. 350 U.S. at 256. Thus, as the Department has made clear in its Advisory Memorandum, whether clothing is "unique" or "nonunique" is not dispositive in determining whether donning and doffing the clothing is compensable. See Wage and Hour Advisory Mem. No. 2006-2, at 3.

Third, Gorman inappropriately emphasized the "minimal" nature of the clothing at issue in that case in concluding that time spent donning and doffing that clothing at work was not compensable. See Gorman, 488 F.3d at 594. The amount of clothing worn, and the amount of effort involved in putting on or taking off this clothing, does not render donning and doffing the clothing non-compensable under the Portal Act if it would otherwise qualify as integral and indispensable under Steiner and the relevant DOL regulations. See Alvarez, 339 F.3d at 903 ("[E]ase of donning and ubiquity of use do not make the donning of such equipment any less

'integral and indispensable' as that term is defined in Steiner.").[6]

A number of courts explicitly have disagreed with Gorman because of these flaws in its analysis. See Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 864-65 (W.D. Wis. 2007) (noting that Gorman's interpretation of Steiner is "truly bizarre"); see also Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 808-09 (M.D. Tenn. 2008) ("[T]he Gorman Court did not explicitly consider whether the activities at issue there were required and necessary and whether they primarily benefi[t]ed the employer, and concluded, somewhat inexplicably and in reliance on Reich [v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994)], that an activity is not necessarily integral just because it was 'required by the employer or by governmental regulation.'") (quoting Gorman, 488 F.3d at 594); Chao v. Tyson Foods, 568 F. Supp. 2d at 1312 (declining to rely on Gorman); Lemmon v. City of San Leandro, 538 F. Supp. 2d 1200, 1204 n.3 (N.D. Cal. 2007) (rejecting reliance on Gorman's interpretation of the "integral and indispensable" standard). As

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[6] The FLSA provides employers with a "de minimis" defense that allows them to avoid paying for otherwise compensable time in certain circumstances. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."). When applying this defense in the donning and doffing context, however, it is the amount of aggregate time spent donning and doffing, and not the amount of clothing worn, that is relevant. See Wage and Hour Advisory Mem. No. 2006-2, at 4.

explained above, this Court need not expressly reject, or even mention, Gorman in order to decide this case. See section 3, supra. Given the problems with the Second Circuit's analysis, which other courts have noted, this Court should not have relied on that decision here.

CONCLUSION

For the foregoing reasons, the Secretary supports Defendant-Appellee's petition for panel rehearing. This Court should nonetheless affirm summary judgment for Defendant-Appellee for the reasons stated above.

Respectfully submitted,

GREGORY F. JACOB
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation

JOANNA HULL
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Suite N-2716

55a
Washington, D.C. 20210
(202) 693-5555

Appendix E

United States Court of Appeals,
For the Seventh Circuit
Chicago, Illinois 60604

December 3, 2007

Before

WILLIAM J. BAUER, *Circuit Judge*

RICHARD D. CUDAHY, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 07-1055

ANTOINETTE PIRANT,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 9383

Joan Humphrey Lefkow, *Judge.*

ORDER

Based on the petition for panel rehearing filed on November 3, 2008, by Defendant-Appellee United States Postal Service, the panel opinion issued on September 4, 2008, is hereby modified as follows:

- Footnote number 2 on page 12 of the slip opinion is deleted.

- Pages 12 and 13 of the slip opinion are modified to delete the full paragraph that begins "In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007) . . ." and to remove certain text from the final two paragraphs of the opinion. Pages 12 and 13 now read:

> noted, however, that "changing clothes and showering under normal conditions" generally would not be compensable. *Id.* at 332; *see also* 29 C.F.R. § 790.7(g) ("[o]ther types of activities which . . . would be considered 'preliminary' or 'postliminary' activities, include . . . changing clothes, washing up or showering"); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (requiring employees to put on safety glasses, earplugs, and a hard hat "is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe"); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001) (donning of aprons, smocks, gloves, boots, hairnet, and earplugs not compensable).

> Here, Pirant was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes. The donning and doffing of this type of work clothing is not "integral and indispensable" to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes "under normal conditions" that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity. Accordingly, the district court properly concluded that Pirant is not entitled to include this time in her hours-of-service total for purposes of the FMLA.

AFFIRMED.

The petition for rehearing is otherwise denied.

Appendix F

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1055

ANTOINETTE PIRANT,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 03 C 9383 — Joan Humphrey Lefkow, *Judge.*

ARGUED OCTOBER 23, 2007
DECIDED SEPTEMBER 4, 2008

Before BAUER, CUDAHY, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.*

[ORIGINAL TEXT OF SEPT. 4, 2008 OPINION, SECTION II.C BEFORE REVISION]

C. Donning and Doffing of Gloves and Uniform

Finally, Pirant claims she is entitled to credit for the three to five minutes she spent each workday putting on and removing her gloves, shoes, and work shirt. The FMLA provides that the determination of whether the hours-ofservice requirement for leave eligibility has been met is governed by the legal standards of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(2)(C) (cross- referencing 29 U.S.C. § 207).

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Supreme Court held that the time employees spent donning aprons and overalls was compensable under the FLSA. But Congress responded with the Portal-to-Portal Act, 29 U.S.C. § 254, which amended the FLSA to exclude from compensation "activities which are preliminary to or postliminary to [the] principal activity [the employee is employed to perform] . . . which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2).

In a subsequent case interpreting the amended statute, the Supreme Court held that activities such as washing up or changing clothes would be compensable only "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded" by the Portalto-Portal Act. *Steiner v. Mitchell*, 350 U.S. 247, 256

(1956). The Court held in *Steiner* that a battery manufacturer must compensate its employees for the 30 minutes they spent putting on unique protective clothing and bathing at the factory because those activities were indispensable to the health and safety of the employees. *Id.* The Court noted, however, that "changing clothes and showering under normal conditions" generally would not be compensable.[2] *Id.* at 332.

In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007), the Second Circuit held that the donning of a minimal amount of nonunique safety clothing, such as helmets, goggles, and steel-toed boots, is not compensable under the FLSA. Though this safety clothing was required by the employer in *Gorman,* the court held that the *de minimis* time spent "donning and doffing [ ] such generic protective gear is not different in kind from the 'changing clothes and showering under normal conditions,' which, under *Steiner,* are not covered by the FLSA." *Id.* (quoting *Steiner*, 350 U.S. at 249). The court distinguished *Steiner* on the ground that

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[2] In *IBP, Inc. v. Alvarez,* 546 U.S. 21, 40-41 (2005), the Supreme Court held that post-donning and pre-doffing waiting time was not a principal activity and therefore was excluded from coverage under the Portal-to-Portal Act. The Court noted that the employer in *Alvarez* had not challenged the court of appeals' holding that the donning and doffing of unique protective gear was a "principal activity" and therefore compensable; the issue before the court was whether the post-donning/pre-doffing waiting time was compensable. *Id.* at 32.

the special protective equipment in that case protected the employees from battery acid and therefore was indispensable to making the working environment nonlethal. *Id.* at 593.

Gorman is consistent with regulations implementing the Portal-to-Portal Act, *see* 29 C.F.R. § 790.7(g) ("[o]ther types of activities which . . . would be considered 'preliminary' or 'postliminary' activities, include . . . changing clothes, washing up or showering"), and other cases are in accord. *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (requiring employees to put on safety glasses, earplugs, and a hard hat "is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe"); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001) (donning of aprons, smocks, gloves, boots, hairnet, and earplugs not compensable).

Here, Pirant was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes. We agree with the Second Circuit's decision in *Gorman* that the donning and doffing of this type of work clothing is not "integral and indispensable" to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes "under normal conditions" that the Supreme Court said in *Steiner is* ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity. Accordingly, the district court properly concluded

that Pirant is not entitled to include this time in her hours-of-service total for purposes of the FMLA.

AFFIRMED.

APPENDIX G

Statutory Provisions Involved

29 U.S.C.A. § 2611

2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

...

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

29 U.S.C.A. § 203

As used in this chapter—

...

(o) Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C.A. § 254

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of

such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

No. 08-1100

In the Supreme Court of the United States

ANTOINETTE PIRANT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MICHAEL JAY SINGER
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the time petitioner spent putting on and removing her work clothing was "preliminary" and "postliminary" to her principal work activities under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, and thus did not count toward the hours-of-service requirement for eligibility under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*

2. Whether the court of appeals correctly concluded that petitioner was not entitled to count toward the FMLA hours-of-service requirement a period during which she alleges she was wrongfully suspended, even though she did not file a timely challenge to the suspension.

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In the Supreme Court of the United States

No. 08-1100

ANTOINETTE PIRANT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 542 F.3d 202. The opinion of the district court (Pet. App. 15a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 3, 2007 (Pet. App. 56a-58a). The petition for a writ of certiorari was filed on March 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, permits an "eligible employee" of a covered employer to take leave for, among

other things, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1). To be eligible for FMLA coverage, an employee must have worked for a covered employer for at least 1250 hours during the previous 12 months. 29 U.S.C. 2611(2)(A). Whether an employee has satisfied the statutory hours-of-service requirement is determined by reference to the principles established under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, for determining compensable hours of work. See 29 U.S.C. 2611(2)(C) (citing 29 U.S.C. 207); 29 C.F.R. 825.110(c).

In an early case interpreting the FLSA, this Court held that the time employees spent on "certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls," was compensable under the statute. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-693 (1946). Congress responded to *Anderson* by enacting the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (29 U.S.C. 251 *et seq.*), which specifies that certain activities performed before or after the workday are not compensable. 29 U.S.C. 254(a)(2); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 26-28 (2005). The Portal-to-Portal Act provides that an employer need not compensate an employee for "activities which are preliminary to or postliminary to [the employee's] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a)(2).

In regulations promulgated shortly after enactment of the Portal-to-Portal Act, the Department of Labor (DOL) has made clear that "changing clothes" and

"washing up," when performed "under the conditions normally present," are considered noncompensable "preliminary" or "postliminary" activities. 29 C.F.R. 790.7(g). The regulations also provide, however, that changing clothes is compensable if it is an "integral" part of the employee's performance of her principal work activity or activities: "If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c) (footnote omitted). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. But "[o]n the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c).

2. Petitioner worked as a mail handler for the United States Postal Service from 1993 to 2002. During that time she had several unexcused absences from work for which she received various disciplinary sanctions, including multiple suspensions. In March 2000, she received a year-long suspension for poor attendance. She returned to work in March 2001 under a "Last Chance Agreement," pursuant to which she was required to maintain satisfactory attendance, including no more than three unscheduled absences and no absence without leave. Pet. App. 4a, 17a.

After she returned to work, petitioner had several additional unscheduled absences. In September 2001,

she was notified that she would be terminated for violating the Last Chance Agreement. The following month, the Postal Service placed petitioner's removal in abeyance for 45 days, specifying that she "[m]ust not have any further unsched[uled] absences" and explaining that even if she maintained perfect attendance, she could still be removed at the end of the 45-day period. On December 5, 2001, petitioner called in an unscheduled absence three hours before her shift and did not return to work until December 7, 2001. On January 4, 2002, the Postal Service terminated petitioner's employment. Pet. App. 4a-6a, 17a-18a.

3. Petitioner sued the Postal Service, alleging that it violated the FMLA by terminating her for missing work on December 6, 2001. Petitioner claimed that she had missed work on that date because of a serious health condition, namely, osteoarthritis in her knee. Pet. App. 6a, 18a.

The district court granted summary judgment for the Postal Service. Pet. App. 15a-34a. The court concluded that petitioner was ineligible for FMLA leave because her payroll records showed that she had fallen 1.2 hours short of the 1250 hours of service over the last 12 months required for FMLA eligibility. *Id.* at 32a.

The district court rejected petitioner's argument that the Postal Service failed to count two hours on October 5, 2001, during which she had been wrongfully suspended by her supervisor. Pet. App. 29a. The court concluded that it was unnecessary to decide whether petitioner would be entitled to count those hours if they were due to a wrongful suspension, despite the fact that she did not actually work during those hours, because "there is no evidence in this case that [petitioner's] suspension was wrongful." *Ibid.*

The district court further held that petitioner was not entitled to count the time she spent each day changing into her work clothes, including a work shirt, apron, gloves, and shoes. Pet. App. 29a-31a. The court held that petitioner's clothes-changing activities were within "the range of ordinary clothes changing and showering that need not be compensated under the FLSA." *Id.* at 31a (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

4. The court of appeals affirmed. Pet. App. 1a-14a. The court of appeals agreed with the district court that petitioner was not entitled to credit for her two-hour suspension on October 5, 2001. *Id.* at 10a-11a. The court noted that petitioner had been advised of her right to file a formal grievance and a request for back pay after the incident, but did not do so until after she was terminated and the regulatory filing period had expired. The court concluded that, "[b]y failing to pursue a formal challenge to her suspension, [petitioner] has accepted that she is not entitled to either compensation or FMLA credit for the lost two hours." *Id.* at 11a.

The court of appeals also agreed with the district court that the time petitioner spent putting on and removing her work clothing was not compensable under the FLSA and thus did not count toward the FMLA's hours-of-service requirement. Pet. App. 13a. The court noted that this Court has held that activities such as changing clothes are compensable under the FLSA only "'if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded' by the Portal-to-Portal Act." *Id.* at 12a (quoting *Steiner*, 350 U.S. at 256). The court saw no basis for concluding that the time petitioner spent changing clothes before

and after her shift was "integral and indispensable" to her principal activities:

> Here, [petitioner] was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves and work shoes. The donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity.

Id. at 13a (quoting *Steiner*, 350 U.S. at 249, 256).

In its initial opinion, the court of appeals also cited and relied in part on the Second Circuit's decision in *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586 (2007), cert. denied, 128 S. Ct. 2902 (2008), which held that donning and doffing "generic protective gear," such as "a helmet, safety glasses, and steel-toed boots," are noncompensable under the FLSA because such activities are "relatively effortless * * * preliminary tasks." *Id.* at 594 (internal quotation marks and citation omitted); see Pet. App. 61a-62a (discussing *Gorman*).

In a petition for panel rehearing, the Postal Service, supported by DOL as *amicus curiae*, requested that the court of appeals amend its opinion to remove the discussion of *Gorman*. Pet. App. 35a-42a, 43a-55a. The Postal Service's brief explained that DOL considered *Gorman*'s focus on the non-extensive and non-unique nature of the clothing at issue to be inconsistent with DOL regulations. *Id.* at 40a-41a. The Postal Service further explained that reliance on *Gorman* was unnecessary to re-

solve the case, since "[t]here was no evidence that [petitioner] was required to change clothes at work, nothing showing that she could not have done so prior to coming to work, or any other evidence that might create a genuine dispute as to whether or not the clothes-changing at issue here was 'integral and indispensable' to [petitioner's] work." *Id.* at 40a. In response to the petition, the court of appeals modified its opinion to delete the references to *Gorman*. *Id.* at 56a-58a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly concluded that there was no basis in the record from which to conclude that the time petitioner spent changing clothes before and after work should count towards the FMLA's eligibility requirement of 1250 hours of service.

For purposes of the FMLA, the computation of an employee's hours of service is governed by the FLSA. See 29 U.S.C. 2611(2)(C) (citing 29 U.S.C. 207); 29 C.F.R. 825.110(c). Under the Portal-to-Portal Act, activities such as changing clothes before or after a work shift are included in an employee's compensable hours if those activities "are an integral and indispensable part of the [employee's] principal activities." *Steiner* v. *Mitchell*, 350 U.S. 247, 249, 256 (1956).

In *Steiner*, this Court held that the time battery plant employees spent changing into and out of work clothes and bathing after their shifts was "an integral and indispensable part of the principal activity of the employment," and thus compensable under the Portal-to-Portal Act. 350 U.S. at 256. The Court explained that

"[s]afe operation" at the plant "require[d] the removal of clothing and showering at the end of the work period" and that state law and the employers' insurers required the employer to provide facilities onsite for those purposes. *Id.* at 250-251. The Court, however, distinguished such activities from "changing clothes and showering under normal conditions." *Id.* at 249; see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29 (2005).

The court of appeals in this case correctly held that time petitioner spent donning and doffing her work clothing was not "integral and indispensable" to her principal activities as a mail handler. See Pet. App. 11a-13a. The only evidence petitioner offered to support her contention that she should have been credited for time she spent changing clothes was a declaration stating that when she arrived at work, she "would put on a work shirt, change shoes, put on [her] apron and collect [her] gloves," spending "approximately three to five minutes at [her] locker" before she "clock[ed] in" for her shift. See Pl. Mem. in Opp. to Def. Mot. for Summ. J. 2, 9; *id.* Exh. F ¶¶ 20, 21 (Declaration of Antoinette Pirant). Petitioner presented no evidence showing that she was required to change into certain items of clothing on the premises, or otherwise showing that the time in question was anything other than time spent "changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity." Pet. App. 13a (quoting *Steiner*, 350 U.S. at 249).

b. Despite petitioner's arguments to the contrary (Pet. 17-19), the court of appeals' decision is consistent with DOL's interpretation of the Portal-to-Portal Act.

As petitioner notes (Pet. 17), the Postal Service, supported by DOL as *amicus curiae*, sought panel rehear-

ing because of DOL's concern that the panel's opinion as originally drafted explicitly endorsed the reasoning of *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008). DOL's *amicus* brief explained that the analysis in *Gorman* incorrectly emphasized the "generic" and "minimal" nature of the clothing at issue in those cases, rather than considering whether the employee could not "perform his principal activities without putting on certain clothes," 29 C.F.R. 790.8(c), and whether "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work," 29 C.F.R. 790.8(c) n.65. Pet. App. 51a. In response, the panel modified its opinion to eliminate any reliance on *Gorman* or its reasoning. *Id.* at 56a-58a.

The changes to the court of appeals' opinion were not merely "[c]osmetic," as petitioner asserts (Pet. 19). Although the modified opinion notes that petitioner "was not required to wear extensive and unique protective equipment," (Pet. App. 13a), the opinion does not establish that the "*kind* of protective gear and *effort* involved in wearing it" necessarily dictate whether donning and doffing time is compensable under the FLSA. Pet. 19-20. Rather, the opinion simply reflects the unremarkable proposition that the type of clothing involved here, standing alone, provided no basis for concluding that petitioner's changing was anything other than "changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity." Pet. App. 13a. Petitioner pointed to no other evidence that might support a finding that the time she spent changing into her work clothing was "integral and indispensable" to her principal work activi-

ties. *Steiner*, 350 U.S. at 256. The decision below is thus consistent with both the statute and DOL regulations. As DOL explained in its *amicus* brief, the agency agrees with the court of appeals' disposition of the case and its determination that the time petitioner spent changing into her work clothes was not compensable. See Pet. App. 44a, 49a-50a.

Petitioner errs in contending (Pet. 18-19, 20) that DOL regulations require compensation for the donning and doffing of any clothing that an employer requires an employee to wear. On the contrary, as petitioner herself appears to acknowledge, DOL's longstanding view is that donning and doffing time may be compensable "where the changing of clothes *on the employer's premises* is required." Pet. 18-19 (internal quotation marks and citation omitted) (emphasis added); see 29 C.F.R. 790.8(c) & n.65; see also DOL, *Wage and Hour Advisory Memorandum No. 2006-2*, at 3 <http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemo2006_2.pdf> (donning and doffing of required work gear is compensable "only when the employer or the nature of the job mandates that it take place on the employer's premises"). Petitioner cited no evidence that she was required to change at her job site, and she cites none in her petition to this Court. See Pet. 20-21.[1]

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[1] It is also unclear what, if any, items petitioner was required to wear on the job. The evidence in the record concerning petitioner's donning and doffing activities consists of the declaration in which she states that before work she "would put on a work shirt, change shoes, put on [her] apron and collect [her gloves]." See Pl. Mem. in Opp. to Def. Mot. for Summ. J. Exh. F ¶ 20 (Declaration of Antoinette Pirant). Although petitioner contends that the courts below "unequivocally held that [petitioner] alleged she was required to wear the protective gear," Pet. 20, the matter is not free from doubt. The district court stated only that handling mail required petitioner "at most * * * to use ordinary

c. Petitioner contends (Pet. 11-22) that this Court's review is warranted to resolve a conflict among the courts of appeals about whether "the time an employee spends donning and doffing required work gear may only be counted if the gear is unique or burdensome to wear." Pet. i.

Petitioner is correct that courts of appeals have taken different approaches to the question whether donning and doffing non-unique, non-burdensome gear qualifies as "work" or as an activity that is "integral and indispensable" to an employee's principal activities. Compare *De Ascencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) (donning and doffing is "work" if it is "controlled or required by the employer and pursued for the benefit of the employer," without regard to whether it requires a "sufficiently laborious *degree* of exertion"), cert. denied, 128 S. Ct. 2902 (2008), and *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 903-904 (9th Cir. 2003) (donning and doffing of non-unique protective gear such as hardhats and safety goggles may be "integral and indispensable" to an employee's principal activities, despite the "ease of donning and ubiquity of use" of the gear, but is nevertheless "noncompensable as *de minimis*"), aff'd on other grounds, 546 U.S. 21 (2005), with *Gorman*, 488 F.3d at 593 (donning and doffing "generic protective gear" such as "a helmet, safety glasses, and steel-toed boots" are not "integral" to an employee's principal activities, but are "'relatively effortless,' non-compensable, preliminary tasks") (quoting *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995)), and *Reich* v. *IBP*,

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gloves and an apron." Pet. App. 31a. The court of appeals, without citing any district court findings or record evidence, stated that petitioner was "required" to wear "a uniform shirt, gloves, and work shoes." *Id.* at 13a.

Inc., 38 F.3d 1123, 1125-1126 (10th Cir. 1994) (donning and doffing is not "work" if the gear "can easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things").

This case, however, is not a suitable vehicle for resolution of any tension that may exist among the courts of appeals on that question. As explained above, see pp. 8, 9-10, *supra*, the decision below does not hold that "the time an employee spends donning and doffing required work gear may only be counted if the gear is unique or burdensome to wear," Pet. i, but instead holds that, given the facts of this case, petitioner's donning and doffing activities were "akin to changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity," Pet. App. 13a (quoting *Steiner*, 350 U.S. at 249). That decision does not implicate the conflict in authority that petitioner raises.

Petitioner also errs in suggesting (Pet. 9, 10, 13-17) that other courts would have found her donning and doffing time to be "integral and indispensable" to her principal employment activities solely because her employer assertedly required that she wear certain items on the job. See note 1, *supra*. The cases on which petitioner relies do not support such hypothesizing. In both *Alvarez* and *De Ascencio*, the employer not only required that certain clothing or gear be worn, but also that the employees change into the gear *on the employer's premises*. *Alvarez*, 339 F.3d at 903; *De Ascencio*, 500 F.3d at 363 n.3, 372; accord *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004). The analysis in those cases is thus consistent with DOL's regulations

interpreting the Portal-to-Portal Act, which provide that donning and doffing work gear may be "integral and indispensable" to an employee's principal activities where "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, there is no evidence in this case that petitioner was required to change on site.

2. The court of appeals also correctly held that petitioner was not entitled to FMLA credit for the two hours of time on October 5, 2001, during which she concededly did not work but alleges she was improperly instructed to "clock-out" early. Pet. App. 10a-11a.

A Postal Service Dispute Resolution Specialist investigated the "clock-out" incident and informed petitioner of her right to file a formal grievance for restoration of back pay within 15 days. Pet. App. 5a. Petitioner failed to do so until weeks after the 15-day deadline had passed. *Id.* at 6a. She did not appeal the dismissal of her grievance or file any further challenge to the two-hour suspension. *Ibid.*

As the court of appeals explained, petitioner was not entitled to FMLA credit for hours she did not work, based solely on her "unsubstantiated subjective belief that her two-hour suspension was wrongful." Pet. App. 11a. See 29 U.S.C. 207(e), 2611(2)(A)(ii), 2611(2)(C); see also *Plumley* v. *Southern Container, Inc.*, 303 F.3d 364, 370 (1st Cir. 2002) (reading Section 207(e) to include "only those hours that an employer suffers or permits an employee to do work * * * for which that employee as been hired and is being paid").

The court of appeals' decision does not conflict with the Sixth Circuit's decision in *Ricco* v. *Potter*, 377 F.3d 599 (2004). In *Ricco*, the Sixth Circuit held that where

a plaintiff had grieved her termination and obtained reinstatement with full credit for years of service and back pay, she was also entitled to FMLA credit for hours she had not worked because of her unlawful termination. *Id.* at 601, 605. By contrast, in this case, petitioner neither timely sought nor obtained any relief for her suspension. See Pet. App. 11a.

Petitioner faults the court of appeals for imposing a "contract-based precondition on [her] eligibility for relief created by a federal statute." Pet. 25. But petitioner cites no authority, and we are aware of none, holding that an FMLA plaintiff is entitled to raise a belated collateral challenge to an employment suspension in order to claim credit for hours she admittedly did not work.[2] Further review is not warranted.

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[2] Petitioner cites (Pet. 23) *Nance* v. *Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008), cert. denied, 129 S. Ct. 1319 (2009), in support of the proposition that a plaintiff need not file a grievance in order to receive FMLA credit for hours during which she alleges she was wrongly prevented from working. The court in *Nance* did not, however, consider that question, having rejected the plaintiff's request for post-termination FMLA credit on the ground that the plaintiff had not been terminated, but instead had resigned without notice. *Id.* at 557-558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MICHAEL JAY SINGER
DANA J. MARTIN
Attorneys

JUNE 2009

(3)

No. 08-1100

Supreme Court, U.S.
FILED
JUL 15 2009
OFFICE OF THE CLERK

IN THE
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UNITED STATES POSTAL SERVICE,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

C. STEVEN TOMASHEFSKY
STEIN, RAY & HARRIS LLP
222 West Adams Street
Suite 1800
Chicago, Illinois 60606
(312) 516-2087

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, D.C. 20001
(202) 639-6048

ERIC A. SACKS
EDWARD P. MCKENNA
JENNER & BLOCK LLP
330 North Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

ATTORNEYS FOR ANTOINETTE PIRANT

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I. The Decision Below Deepens a Circuit Split Over Whether the Degree of Effort Involved in Donning and Doffing Protective Gear Is Relevant to Computing Hours Worked Under FLSA and FMLA.

A. The Decision Below Clearly Implicates the Split.

The Postal Service acknowledges that there is a circuit split on the question whether an employee should be credited with time spent donning and doffing work-related gear under the time-keeping provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 254, as incorporated in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2611(2)(C). *See* Opp. 11-12. But the Postal Service contends that the decision below does not implicate this split and instead reflects the application of a settled standard to the specific facts of this case. That is plainly incorrect. The sole basis for the decision below was that Petitioner Pirant "was not required to wear *extensive and unique* protective equipment." Pet. App. 13a (emphasis added). That rule of decision places the Seventh Circuit in clear opposition to the Third and Ninth Circuits and on the side of the Second and Tenth Circuits in the split. The Postal Service's argument mischaracterizes the basis for the decision below and the rules other circuits have applied.

The standard in the Third Circuit in *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), and the

Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), prohibits consideration of the type of gear and the effort involved in donning and doffing it – the very consideration that was outcome-determinative here. Instead, those circuits focus on whether the gear is required by the employer for its benefit. The standard in the Second Circuit in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir 2007), *cert. denied*, 128 S. Ct. 2902 (2008), and the Tenth Circuit in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) – and now Seventh Circuit in the decision below – focuses on the type of gear and the effort involved in donning and doffing it to determine whether the time should be counted. Moreover, the Department of Labor has made it clear that it stands with the Third and Ninth Circuits on the issue. Pet. App. 39a. Indeed, after the Seventh Circuit issued its opinion below relying on the Second Circuit's *Gorman* decision, the Secretary of Labor requested rehearing, arguing that *Gorman* wrongly focused on whether the gear was "unique or non-unique, and how extensive it was." *Id.*

The Seventh Circuit's revised opinion deleted the citation to *Gorman* but did not change any of the stated reasoning in the initial decision, retaining the rationale that Ms. Pirant's donning and doffing time does not count because she "was not required to wear *extensive and unique* protective equipment." Opp. 9 (emphasis added). Remarkably, the Postal Service claims that the revised opinion below "does not establish that the '*kind* of protective gear and *effort* involved in wearing it' necessarily dictate whether

donning and doffing time is compensable under the FLSA." *Id.* (emphasis in original). That assertion ignores the Seventh Circuit's reasoning, which is still based on the *Gorman* rationale.

The Postal Service also ignores the Seventh Circuit's reliance on the Tenth Circuit's decision in *Reich*. Like *Gorman*, *Reich* turned on the degree of exertion required to don and doff the gear, although it focused on whether donning and doffing was "work." The continuing validity of *Reich* is doubtful in light of this Court's holding that "'exertion' [is] not in fact necessary for an activity to constitute 'work' under the FLSA." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). The Postal Service explicitly recognizes the kinship between *Reich* and *Gorman* and concedes those decisions represent "different approaches" to the issue of counting employee time. Opp. 11. Thus, the Seventh Circuit's citation to *Reich* shows the side of the split on which it stands.

Contrary to the Postal Service's characterization of the decision below, it *does* turn on "the type of clothing here, standing alone." Opp. 9. The decision emphasized that the required gear was not "extensive and unique" and therefore concluded that "[t]he donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable." Pet. App. 13a.

That implicates the core issue in the circuit split: whether the "type of clothing" governs the outcome. The Ninth Circuit strongly said "no" in

Alvarez, holding that "ease of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable'" to the job. 339 F.3d at 903. Likewise, in *De Asencio*, the Third Circuit reversed its district court, holding that a jury was impermissibly directed to consider whether donning and doffing the gear involved "some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer." *De Asencio*, 500 F.3d at 373 (quotation marks omitted). In both the Third and Ninth Circuits, the test focuses on the employer's requirements, not on the "type of work clothing." Pet. App. 13a.

The different test here was outcome-determinative. *Gorman*, *Reich*, and now the Seventh Circuit's decision below all require the courts to evaluate whether clothing or gear is unusual or burdensome. On the other hand, *De Asencio* and *Alvarez* avoid *post-facto* second-guessing and focus on the objective factor of whether the employer considered the clothing or gear important enough to require its use.

B. Neither the Decision Below Nor the Other Cited Appellate Decisions Turned on Whether Donning and Doffing Was Required to Occur on the Employer's Premises.

In an attempt to draw attention away from the Seventh Circuit's clear adherence to the side of the

circuit split disavowed by the Department of Labor, the Postal Service argues that the Seventh Circuit based its rejection of Ms. Pirant's claim on a failure to show that her employer required her to don and doff the gear on the employer's premises. Opp. 10, 12. But that rationale played no role in the Seventh Circuit's decision, which expressly turned on a finding that the clothing was not extensive or unique and made no mention of whether the donning and doffing was required to occur on the employer's premises. Indeed, the only finding the Seventh Circuit made that remotely relates to that issue favors Ms. Pirant: the Seventh Circuit held that Ms. Pirant was "required" to wear the gear by her employer. Pet. App. 13a.

Nor did the decisions on the other side of the split – *Alvarez* and *De Asencio* – turn on whether donning and doffing was required to take place on the employer's premises. While such an employer requirement did in fact exist in both cases, nothing in the courts' reasoning made that factor significant to the outcome. In *Alvarez*, the court employed a test based on whether the gear (1) was necessary to the employee's principal work and (2) benefited the employer. 339 F.3d at 902 03.[1] The court in *De Asencio* endorsed the decision in *Ballaris v. Wacker*

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[1] The Ninth Circuit in *Alvarez* also examined whether this preparatory time was *de minimis* in order to conclude whether it should be counted. 339 F.3d at 903-04. But the Seventh Circuit did not address the *de minimis* issue, and the Postal Service's opposition does not raise it here, so it is irrelevant to this proceeding.

Siltronic Corp., 370 F.3d 901, 910-11 (9th Cir. 2004), particularly to the extent it looks to whether "this activity was performed at both broad and basic levels for the benefit of the company," which "led to the conclusion that the activity was not precluded by the Portal-to-Portal Act as merely preliminary." 500 F.3d at 372. Nothing in those opinions states that the outcome turned on whether changing on the premises was required.

The Postal Service places undue emphasis on a footnote in a DOL regulatory guideline that the Seventh Circuit did not even mention. The footnote states the DOL's view that donning and doffing "may" be integral and indispensable to the job "where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. § 790.8(c) n.65. Those suggested factors are reduced by the Postal Service – with reference to the *De Asencio* and *Alvarez* opinions – to a rule that donning and doffing time can only be counted when "the employer not only required that certain clothing or gear be worn, but also that the employees change into the gear on *the employer's premises*." Opp. 12 (emphasis in original). To the extent the Postal Service implies that time cannot be counted unless the employer requires changing to take place on the premises, that is incorrect. The guideline clearly states that time can be counted when the employer does not require the employee to change on the premises, if the "nature of the work" necessitates it.

More importantly, as noted above, the Seventh Circuit did not even discuss any additional "employer's premises" requirement. To be sure, it did note that the Postal Service required Ms. Pirant to wear specific gear suited to her work. Pet. App. 13a. But the Seventh Circuit did not decide whether those facts were at all relevant. Indeed, it ignored them. Its decision turned solely on whether the gear was unique and extensive – the very factors that the Third and Ninth Circuits have said are irrelevant. Thus, the Postal Service's argument can play no role here.

C. This Court Should Grant Review to Resolve the Split by Rejecting the Erroneous Test Applied Below.

The test employed by the Third and Ninth Circuits is preferable to the standardless test employed by the Second, Seventh and Tenth Circuits. A focus on whether the gear is required by the employer is eminently sensible. As this Court found in *Alvarez*, 546 U.S. at 25, if an employer requires performance by an employee of any task – even if no exertion is required – he employer must necessarily value that task; therefore, its performance is ordinarily compensable work.

Courts on the other side of the split have struggled to determine whether time spent donning and doffing particular gear should be counted. *See, e.g., Gorman*, 488 F.3d at 594 (work gear "may be indispensable without being integral"). The criteria they have applied boil down to little more than "we

know it when we see it." That is particularly true of the Seventh Circuit's decision here, which trivialized the Postal Service's on-the-job judgment (as opposed to its *post facto* litigation position) that the gear was necessary.

A rule focusing on the employer's requirements would remove uncertainty about what time should be counted and take the courts out of the business of determining, purely subjectively, whether donning and doffing particular gear is burdensome. Further, promoting clarity in this area fulfills a major goal of the FLSA and the Portal-to-Portal Act. *See* 29 C.F.R. § 790.4 (citing legislative history of Portal-to-Portal Act).

II. The Seventh Circuit's Requirement of an Arbitral Award as a Precondition of Credit for Wrongful Suspension Time Is at Odds with the Sixth Circuit and Also Merits Review.

In holding that Ms. Pirant could not receive credit for the two hours she alleged she was wrongfully prevented from working, the Seventh Circuit imposed a proof requirement that has no basis in the FMLA or the case law. The Seventh Circuit purported to follow *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004), where the Sixth Circuit held that time for calculating FMLA eligibility can include hours the employee "likely would have worked" if the employer had not prevented her from working them through a wrongful termination or suspension. Nevertheless, the Seventh Circuit refused to consider any record evidence of Ms. Pirant's wrongful suspension because she "fail[ed] to

pursue a formal challenge to her suspension" under her union contract's grievance procedure. Pet. App. 11a. That holding departs from – and conflicts with – *Ricco* and the Sixth Circuit's subsequent decision in *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 547-49 (6th Cir. 2008).

In *Nance*, the court reiterated that *Ricco* held that for FMLA eligibility purposes, an employee should be credited with "hours that the employee wanted to work but was unlawfully prevented by the employer from" working. *Id.* at 557 (quoting *Ricco*, 377 F.3d at 605). The *Nance* plaintiff had pursued a claim under the American With Disabilities Act relating to an unlawful termination and had lost in arbitration before appealing to the district court. Although the *Nance* court ultimately ruled against the plaintiff on the ground that she had resigned and had not been fired, the court explicitly held that *de novo* review of the arbitrator's conclusion was warranted because the federal statutory right could not be circumscribed by the terms of a contract serving a different purpose. *Id.* at 547-49, 556. As the court explained, "because the specialized competence of the arbitrators pertains primarily to the law of the shop, not the law of the land . . . whether [the plaintiff] resigned without notice might mean one thing under [the company's collective bargaining agreement], but it may very well mean an entirely different thing for purposes of an 'adverse employment action' under the ADA." *Id.* at 548-49.

Thus, in the Sixth Circuit a favorable arbitral award is *not* a precondition for litigation of a federal

statutory claim based on the record compiled through ordinary civil procedures. To the contrary, the Sixth Circuit permitted *de novo* litigation of the issues even after an unfavorable arbitration decision. In sharp contrast, the Seventh Circuit refused even to consider the extensive record evidence here.[2] In characterizing Ms. Pirant's claim of a wrongful suspension as merely an "unsubstantiated subjective belief" that the suspension was wrongful, Pet. App. 11a, the Seventh Circuit plainly treated the absence of an arbitral back pay award as the *only* relevant data point and excluded consideration of any other evidence of wrongfulness in the litigation record. That conclusion is both wrong and in conflict with the Sixth Circuit's approach.

Indeed, the Seventh Circuit's decision is contrary to a significant body of law that distinguishes rights based on contract and rights based on statute. It is permissible to require exhaustion of contractual remedies before bringing a *contract-based* claim to federal court. However, a federal *statutory* right cannot depend on exhaustion of contractual remedies. Imposing such a requirement would significantly weaken the right or

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[2] The substantial record evidence included a written report of the incident where Ms. Pirant was suspended for two hours by her floor supervisor by being ordered to clock out and go home. (*See* Pirant's Memorandum in Opposition to Defendant's Motion for Summary Judgment, 03-9383 (N.D. Ill.) [D.E. 62] at 3-4; Pirant Decl., Ex. F, ¶ 22; Ex. L at 0607-09; Andrews Dep., Exhibit M, at 11:15-12:23; 23:3-5; 24:1-25:11.) The supervisor himself conceded he had no authority to order her to clock out. (Peden Dep., Ex. D, at 74:23-78:8.)

protection created by Congress. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 736-38 (1981); *Collins v. Lobdell*, 188 F.3d 1124, 1127 (9th Cir. 1999).

Here, Ms. Pirant did not request that a federal court award her back pay, a contractual remedy she was required to arbitrate. Thus, she did not make a "collateral challenge to an employment suspension," as the Postal Service contends. Opp. 14. Rather, she only sought to establish *as a factual matter* that, but for the two hours she would have worked had she not been sent home prematurely, she would have met the 1250-hour FMLA eligibility threshold. Had she not been covered by a collective-bargaining agreement, the court would necessarily have been required to decide whether the two hours should have counted. Ms. Pirant's eligibility for FMLA benefits cannot hinge on her failure to pursue a contractual remedy established for an entirely different purpose.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

C. STEVEN TOMASHEFSKY
STEIN, RAY & HARRIS LLP
222 West Adams Street
Suite 1800
Chicago, Illinois 60606
(312) 516-2087

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, D.C. 20001
(202) 639-6048

ERIC A. SACKS
EDWARD P. MCKENNA
JENNER & BLOCK LLP
330 North Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

Dated: July 15, 2009